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THE LAW OF ALLUVION AND DILUVION

INCLUDING THE LAW RELATING TO
FISHERY IN PRIVATE RIVERS

WITH COMMENTARIES ON
REGULATION XI OF 1825
THE BENGAL ALLUVION AND DILUVION REGULATION.

historically and critically discussed with reference to Hindu Law,
and Roman, French, English and American Laws, and the
reported decisions of all the Indian High Courts and
Punjab Chief Court and also with reference to
other connected Acts and Regulations
of all Provinces governed by
Regulation XI of 1825.

VOLUME II.

BY

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Vakil, High Court, Calcutta,

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ALLUVION AND DILUVION.

SECTION 4, Clause Second.

4. *Second.*—The above rule shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may, by the violence of stream, separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity and preventing the recognition of the land so removed.

In such cases the land, on being clearly recognized, shall remain the property of its original owner.

The action of a river producing the change indicated by the above words of Clause II, Section 4 of Regulation XI of 1825 is called *Avulsion* according to the Roman Law. Under the Roman Law, *Avulsion* is the second mode of accession of property. (See "Classification of Accessions" p. 213 *ante*). The law on this point is laid down by Justinian in his Institutes in the following words:—"But if the violence of a river should bear away a portion of your land, and unite it to that of your neighbour, it undoubtedly still continues yours. If however it remains for a long time united to your neighbour's land, and the trees, which it swept away with it, take root in his ground, these trees from that time become part of your neighbour's estate"(1). It happens often that when a large mass of land is carried away from one side of a river to the other, it remains quite possible to detach it, and consequently,

Justinian.

(1) Institutes of Justinian by Sanders, p. 99.

the mass thus transferred continues to be the property of the original owner. This is evidently an exception to the general rule of alluvion. But if the portion thus carried away becomes inseparable in the manner described in the above text, it becomes part of the estate to which it is united, and thus *Avulsion* is considered a second mode of acquisition of land.

Colquhoun. The law on the above point has also been stated by Colquhoun in his Roman Civil Law in these words:—
 “The word alluvion implies, however, a gradual increment.....in which it differs from *avulsion* which is a violent separation of a piece of ground by the force of a river, and its annexation to the property of another and neighbouring estate, in which case it belongs to the previous owner; until by length of time, and without any measures taken to prevent it, they cleave together and become firmly united. This may to some extent be demonstrated by the fact of a tree fixed in a piece of ground which was torn away, spreading its roots into another part”(1).

Thus, according to the Roman Law, *Avulsion* will be considered as a mode of accession of property only when the land carried away is lost to the original owner by lapse of time, and he not having taken any measures to prevent the land transported from being firmly united to the estate to which it is transferred. An evidence of coalescence of the transported land with the estate to which it is united will be afforded by the fact of a tree fixed in the torn away land, spreading its root into the estate to which it is carried away. Hence, it appears that the test adopted under the Roman Law to determine whether an accession had been gained by the above mode, was the inseparableness of the one from the other.

The law on the point under consideration seems

(1) A Summary of the Roman Civil Law by Colquhoun § 981.

to be more specific under the French Civil Code, where it is laid down thus :—" If a river or a stream, navigable or not, carries away by a sudden violence a considerable and distinguishable part of a field on its banks, and bears it to a field lower, or on its opposite bank, the owner of the part carried away may reclaim his property, but he is required to make his demand within a year : after this interval it is inadmissible, unless the proprietor of the field to which the part carried away has been united, has not yet taken possession thereof" (1).

Code
Napoleon.

It follows from the passage, just quoted, that under the French Law, the rule stated above applies to navigable and non-navigable rivers or streams. The claim for possession of the transported land should be made within one year, otherwise the claim will be barred after that interval. If possession in the meantime is not taken by the owner of the field to which the transported land is united, the claim may be entertained after the period of one year.

In England, the law on the subject of *Avulsion* does not appear to have been judicially determined, and the opinion of the text-writers who seem to follow the Roman Law, is not very instructive on the subject. References given below may be considered as throwing some light upon the question.

Law of
England.

Lord Hale in stating his view touching islands arising in the sea, said thus :—" But this is to be understood of islands that are newly made ; for if a part of the arm of the sea, by a new recess from his ancient channel, encompass the land of another man, his property continues unaltered." (2)

Lord Hale.

While treating of the Title by Occupancy, Blackstone stated the law of England on the point in the following

Blackstone.

(1) Code Napoleon by R. S. Richards § 559.

(2) Hale "De Jure Maris," Cap. VI.

words:—"In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss." (1).

Kelly, C. B.

In the case of the *Mayor of Carlisle v. Graham* (2), Kelly, C. B., delivering the judgment of the Court, observed as follows:—"All the authorities, ancient and modern, are uniform to the effect that if, by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public."

It appears from the judgment of the Privy Council, in the case of *Ritraj Kunwar v. Sarfaraj Kunwar* (3), that the above observations of Kelly, C. B., were quoted by their Lordships as laying down the English law on the point, and with reference to the above passage, it was further observed by their Lordships in the same case, that although the specific reference in that case was to a tidal river, yet the principle was equally applicable to a non-tidal river.

(1) Blackstone's Commentaries, (Real and Personal Property) Book II, by James Stewart, § 262, 2nd Edition.

(2) L. R. 4 Ex. 361 (368).

(3) 1, L. R. 27 All. 655 (669).

In America, it has been said that *Avulsion* is where, by the immediate and manifest power of the stream, the soil is taken suddenly from one man's estate, and carried to another; and thereby a property is only constituted by acquiescence, for it belongs to the first owner, unless it shall continue on the other's land for so long a time that it cements and coalesces with the soil. If the impetuosity of a river should sever a part of your estate, and adjoin it to that of your neighbour it is certain that such part would still continue yours. (1)

Law of
America.

It would seem that the law in America relating to *avulsion* is drawn from the Roman Civil Law. A property by the process of avulsion according to the law of that country, is constituted by acquiescence. This evidently means that if the owner of the land which is carried away by the sudden irruption of a river to his neighbour's estate, does not lay claim to it, it will then be taken that such owner has relinquished his right to such land, which, by lapse of time, becomes the property of the neighbour. The test of coalescence of the severed land with the neighbour's estates is also a condition which the American law requires to be fulfilled before such land is considered an accession to it. So long as such coalescence is not effected, the owner's right to the severed land continues.

As for the rule of the early Hindu Law relating to the topic under notice, reference may be made to the discussion under the head of "Provisions of Hindu Law" (2), where the original texts of Hindu Law on the subject have been cited.

Hindu Law.

Now turning to the Regulation, it will be seen that Clause Second of Section 4 has been enacted as an exception to the general rule of accretion contained in the

Regulation
XI of 1825.

(1) Angell on Watercourses § 60: *Trustees of Hopkins Academy v. Dickinson*, 9 Cush 544.

(2) See pp. 164-173 *ante*.

First Clause. By Clause II, it was intended to make provisions for cases, in which a river, by a sudden change of its course, severs a part of an estate, and without destroying its identity or preventing its recognition, joins it to another estate. The portion of an estate thus severed although joined to another estate is not an accession to the latter estate under the Regulation. According to the Roman, French, English and American laws, *Avulsion* as stated above has been regarded as a mode of accession of land. But, under all systems of law the circumstance under which land severed would, or would not, be an accession having been set forth clearly, the above distinction does not seem to be worthy of serious consideration. Whether the one or the other aspect be taken, that is to say, whether *Avulsion* is taken as an exception to the rule of accretion, or as a mode of accession, the practical effect comes to the same thing, namely, that the rule of *Avulsion* applies under certain specified conditions of things according to all systems of law, including the law declared by the Regulation.

It is, therefore proposed to consider first the cases, where the contest was between the opposing claims of *Accretion* and *Avulsion*, under the following heads :—

“ A sudden change of its course ” may “join it to another estate” :—

Accretion and
Avulsion.

*Bundhoo
Singh v.
Syed Hossein.*

In *Bundhoo Singh v Syud Hossein Alee* (1), a claim to an accretion was advanced by the proprietor of an estate on the southern bank of the Ganges on the ground that the accretion having formed on the south of the channel belonged to his estate, and it was decreed in his favour by the lower Court. On appeal to the Sudder Dewany of Calcutta, it was held that the land in dispute which originally accreted to the estate of the defendant on the northern side of the river, was transferred to the plaintiff's side by the sudden

change of the course of the channel now flowing to the north of the disputed land, and that the accretion being recognisable as part of the defendant's estate by the *prima facie* evidence of possession by his ryots, the case came under Clause II, Sec. 4 of Regulation XI of 1825. See also *Rai Manik Chand v. Madhoram* (1).

A river while changing its course may encroach upon or submerge a piece of land and then "join it to another estate."

In the case of *Mussumat Imam Bandi v. Hurgobind Ghose* (2), the plaintiff who was owner of Mouza Akbarpoor on the northern side of the Ganges claimed the land which was annexed by the action of the river to the defendant's Mouza Raipoor Hussun on the southern side of the river, on the ground that the land in dispute formed part of mouza Akbarpoor (which according to the plaintiff's case was bounded on the north by Raipoor Hussun, which description placed the boundary of Akbarpoor to the south of the Ganges.) The Court of first instance gave a decree in favour of the plaintiff, but on appeal to the Sudder Dewany of Calcutta, the above decision was reversed in consideration of the facts that the lands in suit were submerged by change of the course of the river Ganges and reappeared after several years on the defendant's side, and that the defendant had been in possession of these alluvial lands attached to his mouza. Thus, according to the decision of the Sudder Dewany, the claim of the plaintiff was barred by limitation, and the lands having formed as alluvial accretion to defendant's mouza, became property of the defendant by the law of accretion. This decree, on appeal to the Privy Council, was reversed upon the grounds *first*, that the question of limitation not having been put in issue by the pleadings could not be alleged to operate

*Imam Bandi
v.
Hurgobind.*

(1) 13 Moo. I. A. 1 : 3 B. L. R. (P. C.) 5 : 11 Suth. W. R. (P. C.) 42.

(2) 4 Moo. I. A. 403 : 7 Suth. W. R. 67 (P. C.)

upon the case, and *secondly*, that the Court had mistaken the question, in supposing it one of alluvion, the point at issue being one of boundary only and that the plaintiff had made out his title to possession.

Under ordinary circumstances, the alluvial lands which were the subject-matter of the above suit, after submergence and subsequent reappearance on the side of the defendant, would have been a case of *avulsion*; but their Lordships of the Judicial Committee applying the theory that *inundation* would not effect a change of ownership, held that the lands which reappeared after submergence on the side of the defendant continued to be the property of the plaintiff as being included in his mauza of Akbarpoor.

Jagat Singh
v.
Brijnath.

In *Jaggat Singh v. Brij Nath Kunwar* (1), the appellant who was proprietor of a village called Murwa on the east bank of the river Gogra brought a suit, claiming land measuring 2058 bighas of alluvial lands annexed to his side of the river, against the defendant (respondent) who was owner of a village called Randa on the west bank of the river Gogra, flowing from north to south. In 1866, which was the commencement of both parties' rights, the river Gogra was flowing in a course which intersected Randa, and the portion of Randa, which was carried to the eastern bank lay between the river and Murwa. Then, in 1885, the river began to work its way eastwards, with the result that it came to have on the western bank of its new course, not only all of Randa that had formerly been on its east bank, but also some part of Murwa. While this situation of things lasted, the disjoined part which came to the side of Randa was taken possession of by the (defendant) respondent. But the Gogra did not long adhere to this course, and soon began to recede to the west; and by 1891 it once more had to its east, not

only the whole of Murwa but also the 2058 bighas of land intervenning between the river and Murwa which was the land in dispute and which the appellant in his plaint admitted to have been historically part of Randa. For a time during the wanderings of the river the land was submerged, and it emerged on the plaintiff's side in an altered form not capable of being identified, as alleged by him.

Upon these facts, the Subordinate Judge of Baraich gave the plaintiff a decree, holding that the land in suit was added to the plaintiff's village Murwa by gradual accretion. On appeal to the Judicial Commissioner, that decision was reversed, and that Court held that it was not a case of "gradual accession" within the meaning of Regulation XI of 1825, but a case in which land transferred from one side of the river to the other, by a change of its channel in the course of years. On appeal to the Privy Council, their Lordships affirmed that decision, and with reference to the above mentioned facts they said thus :—"These being the facts, it is manifest that the case does not fall within the well known chapter of law which treats of the formation of new land, through the gradual and imperceptible washing up of particles by a river or the sea. Nor have we even to deal with the more complicated case in which a piece of land is first disintegrated by water action, and thereafter reintegrated or reformed by water action. The only note of similarity to alluvion to which the appellant could point was that the process of change was so far gradual; but this means merely that the river took several years to change its course. Now the mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B could never deprive A of the lands and transfer them to B. And the proposition maintained by the appellant is by several steps nearer than this to paradox ;

for he contends that if after temporary aberration a river at last leaves the land of A *in statu quo ante* it must be held to be an accession to B, his next neighbour. It is superfluous to say that neither the statute law of India nor the general principles of jurisprudence lend the lightest support to such unreasonable conclusions." In another part of their judgment, in the same case, their Lordships observed :—"What seems really to underlie the appellant's claim is a crude idea that because the respondent once had possession of that part of Murwa, which for the time was transferred to the west side of the river, therefore the appellant ought now to have in property the 2,058 bighas belonging to Randa. No attempt was made to formulate this as a legal proposition."

*Ritraj
Kunwar
v.
Sarfaraz
Kunwar.*

In the case of *Ritraj Kunwar v. Sarfaraz Kunwar* (1), the appellant sued to recover possession of a large extent of land which she claimed as an accretion to her estate of Kamyar lying on the south side of the river Gogra, a non-tidal river, by reason of a change in the channel of the river, the effect of which as stated in the plaint was that "the northern channel receding gradually to the north, the said land was added to Kamyar as alluvial accretion towards the south of the said channel." It was found by the Privy Council that the predecessors of the respondents who owned the northern side of the channel, were the original owners of the land claimed, that there had been no slow and gradual pushing northward of the northern boundary of the appellant's land although land in suit was intersected and submerged by water : and that there was still a channel of the river between the properties of the appellant and respondent, although the main stream shifted to the north. Upon these findings it was held that it was not a case of accretion by gradual, slow,

(1) 1 L. R. 27 All. 655 : 9 Cal. W. N. 889 ; 2 Cal. L. J. 185.

and imperceptible means when the accreted land would belong to the owner of the adjoining land; but the principle applicable to it was that laid down in paragraph 2 of section 4 of Regulation XI of 1825. In that case, the learned counsel for the appellant contended that, whoever may have been originally entitled to the land, it had gradually accreted to appellant's property by an alteration in the course of the river, and therefore by the law of accretion, it belonged to the owner of the adjoining land. Upon this point their Lordships observed: "Here is no question of a gradual and slow process of acquisition to be measured by the inch or the foot or the yard; here land to the extent of more than two thousand acres is claimed, not on the ground that the action of the river has been slowly and gradually to push forward the northern boundary of the appellant's land, but that the northern channel of the river, however it may shift, must be taken to be that boundary. Nor is it the case here that the land laid bare by the alteration of the river's course adjoins the land of the respondent, on the contrary, the evidence is that there is still a channel of the river between the two properties, although the main stream has shifted to the north."

In the case of *Rai Krishna Chandra v. Saidan Bibi* (1), the plaintiff instituted the suit for recovery of certain land belonging to village Poha on the north-east bank of the river Gomti which was submerged and after remaining submerged for not a very long period, re-appeared again. On its re-appearance it was found to be on the opposite side and adjoining village Tatarpur on the north-west bank of the Gomti. The plaintiff's case was that the land in suit was cut off from his village by a change in the course of the river. The defendant, on the other hand, admitting that the land

*Rai Krishna
Chandra
v
Saidan Bibi.*

in dispute formerly belonged to the plaintiff's village, alleged that the change in the course of that river was gradual and that they acquired the land by gradual accretion. Upon the above facts the subordinate Judge of Gorakhpur dismissed the suit of the plaintiff holding that the state of things indicated a "gradual accession" to the defendant's village within the meanings of cl. 1, section 4 of Regulation XI of 1825. On appeal to the Allahabad High Court that decision was reversed and the suit was decreed. In delivering the judgment Stanley, C. J., & Burkitt, J., in one part of it, observed : "The learned Subordinate Judge seems to think that if a considerable tract of land adjoining a stream is submerged and cut off in the course of a month or two, and, when the water has subsided, the course of the stream is found to have been diverted and the land emerged on the opposite bank of the stream, the accession thus created is gradual." And in another part, the learned Judges said : "The evidence inclines us to think that, though the Gomti frequently overflowed its banks from the year 1831 onwards, there was no actual change in the course of the stream until in the great flood of 1891 the river forced a new passage through the land in dispute. This could only be discovered when the water subsided. We have no hesitation, therefore, in coming to the conclusion that the defendants respondents did not acquire title to the property which they claimed by gradual accession. It was by a sudden change in the course of the Gomti that the land in dispute emerged on their side of the river." In this view the appeal was allowed.

Break
through
and intersect"
may include
diluviation.

"May break through and intersect" or "separate" :—Under ordinary state of things, the action of a river denoted by these words in Clause II, can be well understood, but the physical conditions of the country where changes in the river system are

almost normal, and where changes occur almost with "*cataclysmal suddenness*," render it necessary to consider how far those expressions are applicable to the class of cases which have been cited above. It will be evident from the facts of the above decided cases that submersion of the land on one side of the bank and its subsequent re-appearance on the opposite side have been held to come under the physical changes indicated by the above words. It may be said that physical changes contemplated by those expressions have reference to the firm land as well as to the land under water, although expressions like "sudden encroachment" or "sudden submersion or inundation" are not there. But the use of the expression "without any gradual encroachment" in Clause II may be taken to suggest that the cases of "sudden encroachment" or "sudden submergence" followed by "breaking through," "intersecting," or "separating" of land by the action of the river are contemplated by the words of that clause. In the case of *Faggot Singh*, (see p. 334 *ante*) where the land after submersion emerged on the opposite side, it was held that the principle that a change in a river's course which places the land of A in contiguity to the land of B, can not deprive A of the land and transfer it to B, was applicable. The decision in *Rai Krishna Chandra*, (see p. 337) cited above, may be taken as a case in point in support of the view that the physical processes denoted by the words "break through and intersect" or "separate" have reference to the firm land as well as to the land under water. This case may, also, be taken as an instance bordering between *Accretion* and *Avulsion*. The finding of the court below in that case appears to be this that a considerable tract of land adjoining a stream was submerged and cut off in the course of months, and when the water had subsided, the course of the streams was found to have been

diverted, and the land in dispute was seen to have emerged on the opposite bank of the stream. Under these circumstances the Court below held that this was a case of "gradual accession" to the opposite side, but the High Court of Allahabad reversed that decision, holding that this was a case in which land, after being separated from one village by a sudden change of the river's course, re-appeared on the side of the opposite village. But the nature of the evidence which the High Court had before it showed that the land was cut off from the village in question from time to time, although the last flood was considerably great and sudden. (see pages 260-261 of the Report).

Thus the decisions, cited above, evidently show that the cases of submersion of land on one side of the river followed by its subsequent re-appearance on the opposite bank, have been generally considered as covered by the provision of Clause II, Sec. 4 of the Regulation.

"Without any gradual encroachment"—These words are to be understood as qualifying the circumstance of a river breaking through and intersecting an estate. "Breaking through" and "intersecting" by a sudden change of the course of a river, in order to come within the meaning of Clause II, must be such that the physical processes involved, may not amount to "gradual encroachment" by the river, while changing its course; in other words, the "breaking through" and "intersecting" must not be the result of gradual encroachment by the river. This is the plain meaning of the above words of Clause II, Section 4. Now, turning to the decided cases it will be seen that, in cases where submergence of land on one side of the river was followed by re-appearance of the same on the opposite side, and identity between the two was established, the principle involved in Clause II, Section 4, was applied without any special investigation of the

Diluviated
land when
re-appears
reforms on
any other site
if identifiable
comes under
Cl. II.

point, whether the encroachment by the river in any particular case was sudden or gradual (1). In fact, the identity was the only test that was kept in view in those cases, irrespective of the fact whether "breaking through and intersecting" was by sudden or gradual encroachment (2). [See also under "Encroachment" pp. 136-137 *ante*] In some cases, it was argued that the change caused by the river was gradual, inasmuch as sufficiently long time intervened between the submergence and reappearance of the land on the opposite side; but the decision in those cases, turned upon the determination of the point, whether or not, the reformed land on the opposite side could be treated as an accretion to that side, the original ownership of the land before submergence having been proved; and in those cases it was also assumed that the original ownership continued upon re-appearance on the opposite bank,

The following cases may be referred to in support of the view.—In the case of *Jaggot Singh v. Brijnath Kunwar* (3), the attention of their Lordships of the Judicial Committee was drawn to the fact that the change produced by the river was gradual, but notwithstanding that, the principle of the Clause II was held applicable. (See pp. 334-335 *ante*.)

In the case of *Rai Krishna Chandra v. Saidan Bibee* (4), the diluviation of the land on the plaintiff's side of the river commenced in 1881, and the process of cutting aways of the land went on till 1891, after which period the land re-appeared on the defendant's side. It was contended on behalf of the defendant that the river encroached upon the plaintiff's village gradually, in consequence of which the land in dispute was transferred

(1) *Harsuthu v. Itoof Ali*, L. R. 2 Ind. Ap. 28.

(2) *Imam Bandi v. Nurgobind*, 4 Moo. I. A. 403.

(3) 1 L. R. 27 Cal. 758.

(4) 1 L. R. 28. All. 256 (261).

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Syud Lootf
Ali.

to the defendant's side and thus it was an accretion to his estate ; but this contention was overruled and it was held that the case was to be governed by Clause II, Section 4. With reference to this case it is to be noted that not only the identification of the land was established, but there was also a finding that the land emerged on the opposite side by a sudden change of the river's course. The proposition of law laid down by their Lordships of the Judicial Committee, in the case of *Harsuhai Sing v. Syud Lootf Ali Khan* (1), was rather very broad and it might as well refer to the case of *avulsion*. In that case, while restoring the original judgment of the Trial Court of Patna, their Lordships said :—"The land which is the subject of the present suit was sub-merged, and when it first became free from water and reappeared, it adhered to, and adjoined the estate of *Ramnuggur* and *prima facie* the accretion was to that estate ; but upon an inquiry made by the Judge of Patna, who went to the spot, heard evidence, and took great pains to survey the district, he came to the conclusion that the submerged land, although it had reformed close to mouzah *Ramnuggur*, was, in point of fact, land which belonged to mouzah *Muteor*, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that mouzah. He found those facts, and applying the law as he understood it to the facts, namely, that when sub-merged land can be identified upon its re-appearance as belonging to a particular estate, the proprietor of that estate is entitled to it because in truth he had never lost his land, the land was always his, and the difficulty of identification being removed by evidence—the land being in fact identified,—there was no reason why the property should not be regained by him." The view expressed by the Trial Judge was thus approved

(1) 23 Suth. W. R. 8 ; 14 Beng. L. R. 168 ; L. R. 2 Ind. Ap 28.

by their Lordships of the Privy Council, in that case, and the law was further discussed in the following words:—"The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of *Lopes v. Muddun Mohun Thakoor* (13 Mo. I. A. 467), in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged reformed, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it."

It may be noticed that the decision in *Lopes's* case refers to land reformed upon the *original site*, but in the judgment of the case of *Huisuhai Sing*, there is no mention that the land in dispute reformed on the original site; on the other hand, the finding that the land on its reappearance adhered to, and adjoined to the estate of Ramnugger goes to show that it was not a case of reformation *in situ*. At any rate, the proposition of law stated above has been laid down so broadly that it can be taken to refer to reformation *in situ* as well as to land which reappears or reforms after submergence on any site whatever. The law will apply when the identity is established, whether it be a case of reformation *in situ*, or a case of reformation or re-appearance of diluviated land on the opposite side; and in the latter case, it would seem from the report of the decided cases that no investigation of the question as to whether the diluviation was the result of encroachment by a sudden or gradual change of the course of the river, was considered necessary, in view of the fact that the reformed land was identifiable and recognizable.

In the case of *Ritraj Kunwar v. Saifaras Kunwar* (1),

where the principle declared by Cl. II, Sec. 4 was applied, their Lordships of the Judicial Committee observed as follows :—" Presumably land situated in the Respondent's villages would belong to the Respondent whether covered by water or not, and however it might be intersected by the river in its devious course from year to year."

Cases where gradual nature of the encroachment was investigated.

But, in those cases of contest between *Avulsion* and *Accretion*, where the land reformed was not capable of being identified or recognized, a finding was arrived at that the diluviation was the result of gradual encroachment by the river, while changing its course. In the case of *Puhlwan Singh v. Maharaja Mohessur Singh* (1), the High Court of Calcutta in overruling the plea of the defendant who set up a claim to the land in dispute under Cl. II, Sec. 4, Reg. XI of 1825, said :—" We have, therefore, come to the conclusion that the river went through various changes of its channel at different times, but that these changes were gradual, and caused, as a natural consequence, alluvion ; that these changes were not abrupt leaving lands capable of identification, for, if such had been the case, the beds of the river in its various changes of course would be still traceable on the spot, which is not the case."

In the case of *Chungar v. Bahadour Singh* (2), which was a suit for the determination of the proprietorship of land transferred from one side of a river to the other by the action of the stream, and where it was found that the land was carried away gradually, year by year, and that no buildings, trees, or pillars were left by which it could be identified, it was held by the Punjab Chief Court that the land (in the absence of any well-defined custom to the contrary) must be considered an increment to the estate to which it was transferred, and that

(1) Suth. W. R. (Gap. No. 1864), p. 191.

(2) 1868 Punj. Rec. No. 47.

it could not be identified by laying down the survey boundaries.

Now, having regard to the findings in the cases, cited above, it would seem that the real test that is to be kept in view to determine the application of Clause II, Sec. 4, is the identity and recognition of the land which emerges on the opposite bank after submersion. Whether the original encroachment by the river is gradual or not, would not seem to affect very much the question of the applicability of Cl. II, when the identity of the land as forming part of the estate from which it is severed, is established. If a river by *gradual encroachment* break through and intersect an estate, and the intersected portions of such estate be capable of identification and recognition, they will continue to belong to the original owner, as will appear from the following observations of the Privy Council, in the case of *Jaggot Sing v. Brij Nath Kunwar* (1):—
 "The only note of similarity to alluvion to which the appellant could point was that the process of change was so far gradual; but this means merely that the river took several years to change its course. Now the mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B could never deprive A of the lands and transfer them to B." (See also pp. 334-335 *ante*). It would be evident from the view thus expressed by their Lordships that, if land be separated from one estate and joined to another by a gradual change of the course of a river, the principle of Cl. II, Sec. 4 would apply, when its identity is established.

Substantive portion of cl. 2 is identity and recognition.

The view taken above may render the words "without any gradual encroachment" used in Cl. II, Sec. 4, destitute of any significance. This is due to the confused state of the law. The proposition that if a river gradually submerges an estate, that is to say, if a river

Significance of "without any gradual encroachment."

gradually and imperceptibly encroaches upon the land of a subject, the land thereby occupied belongs to the Crown as a converse case of alluvion, would apply to this country in a limited sense, for land encroached upon by a river or the sea, whether suddenly or gradually, is to be held subject to public rights: *Srinath v. Dinabindhu* (1). The question of ownership of the land under water does not arise, so long as it remains under water. It is only when the land emerges or reappears that the question of ownership becomes relevant.

Again, land gradually washed away by encroachment of a river and reduced to the condition of the river bed was considered to be public property at the time when the Regulation was enacted. The law on this point was evidently unsettled before the decision of their Lordships of the Judicial Committee, in the case of *Lopes v. Muddin Mohan* (2), which recognized the property of a private owner in the diluviated soil. Gradual encroachment, as the law stands now, affects the ownership of a private proprietor in the land encroached upon so long as the land does not reform or re-appear (see p. 138 *ante*). If, after reformation or re-appearance, the ownership of the site is established, the land is restored to the original owner. [See also "Diluvion, Sudden and Gradual" under Clause V, *post*].

Avulsion & Diluvion :—It has been discussed above that the principle of Cl. II, Sec. 4, applies when a part of an estate is diluviated and subsequently reappears on the opposite bank. Next, a question arises whether Clause II. Sec. 4 will apply to the case of an estate entirely lost by diluvion. This point was raised in the case of *Kishub Lall Chowdhury v. Messrs. Robert Watson & Co.* (3), decided by the Calcutta High Court.

*Kishub Lall
Robert Watson
& Co.*

(1) I. L. R. 42 Cal. 489: 18 Cal. W. N. 1217.

(2) 13 Moo I. A. 457.

(3) 1864, Suth. W. R. (Gap No.) 64.

While delivering the judgment in that case, Bayley and L. S. Jackson, JJ., said thus :—"The plaintiffs could only have claimed these lands as accretions to an estate of theirs ; but their estate has not only been entirely lost by diluvion, but has actually been removed many years since from the rent-roll of the district. Clause 2 Section 4, Regulation XI of 1825 can not in any way help the plaintiffs, for that Clause refers only to cases where a sudden change, in the course of a stream, has broken through and intersected an estate, leaving an identifiable portion of land separated by the new channel from the main body of the estate. The state of things in the present case is wholly different, the river having by gradual encroachments, carried away the whole estate."

"Reference has been made to a decision of this Court printed at page 284 of Messrs. Hay's Report for September 1862. We do not think that that decision was meant to go so far as the words used might seem to imply. In any case, the decision in question will not cover the present case, for there is no pretence of identifying the lands otherwise than by alleged identity of situation."

From the report of the case, referred to above, it is hardly possible to determine the facts of the case as found in the judgment of the Court below, which the High Court affirmed. But it would seem to be clear that the learned Judges meant to lay down that the original ownership in the land carried away to the opposite bank, as declared by Clause II, Section 4, is not available to a riparian owner whose entire estate has been lost by diluvion, in the same way as the right of accretion can not be claimed by a riparian owner whose estate has been entirely washed away ; see *Bhooban Mohan Sircar v. Messrs. R. Watson & Co.* (1). But some distinction, however, can be pointed

between two cases. Under the law of accretion, the riparian owner will have to establish gradual and imperceptible accession to his estate, and such estate being non-existing, he can not prove the accretion to his estate. But, in the case, where diluviation and re-appearance of a part of an estate has been held to be governed by the principle of Clause II, by reasons of the identification having been established, there the logical consequence can be pushed to the extent that the same principle would apply, when the whole estate is diluviated and reformed in a manner capable of identification and recognition; see *Ramanath Thakoor v. Chunder Narain Chawdhury* (1) This is evidently the idea that underlay the argument advanced in the above case of *Keshub Lall Chawdhury*. But the life of the law has not been logic but experience (2)

As to the correctness of that decision the following points can be urged.—*namely*, (i) that the removal of the estate from the rent-roll of the Collectorate meant a complete abandonment of the land. (ii) that the diluviation having been effected by gradual encroachment of the river, it produced an alteration of ownership: and (iii) that the decision was passed at a time when the law relating to the effect of *identity of situation* was unsettled in this country

In the case of *Thomas Kenny v. Bibee Sumceroonissa* (3), Trevor, and Campbell, JJ. said:—"A claim to hold the land under Clause 2 can only be maintained by the old proprietors when the land used by man has not been diluviated, but is cut off by a change of the stream—fields, trees, houses, or other surface objects remaining as before."

(1) (1864) Marshall Report, 136 : Suth. F. B. Rulings, p. 45.

(2) Common Law by Holmes p. 1.

(3) 3 Suth. W. R. 68.

Evidence of "identity" and "recognition":—

In the case of *Bundhoo Singh v. Syud Hossain Ali* (1), the land carried away was held recognisable by the possession of former tenants. In *Puhlwan Singh v. Maharaja Mohessur Singh* (2), the contention of the defendants-appellants was that the disputed lands were not alluvial at all, but were what are called *chukee* lands, and that these lands were included in the settlement made with them by the Ghazee-poor Collector; and that the Ganges, though it cut through the mahal settled with them and changed its course several times, never destroyed the identity of the lands. Upon this contention, Steer and Kemp, JJ., observed thus: "Now, the map of 1860, which professes to show the different courses which the aforesaid river has taken from time to time, also shows certain numbers as of *daghs* or plots. If those plots would be identified by comparison with any reliable *chittahs* or other settlement proceedings, this map would be very strong, if not conclusive, evidence in support of the defendant's theory of sudden irruption by the river without destruction of identity."

Identified by
possession of
former
tenants,

By com-
parison
of plots with
chittas and
other settle-
ment papers

In appeal to the Privy Council it was argued in the above case of *Baboo Puhlwan Singh v. Maharaja Moheshur Singh* (3), that the Court below was wrong in framing the following issue:—"Whether the disputed lands have been gradually washed away, and have accreted on the estate of the plaintiff by obliteration of its old marks, or whether by the sudden change of the Ganges they have accreted with a continuance of the former mark." And that from the framing of the issue it would follow that obliterations of the old marks were considered to be conclusive of the question of gradual accretion set up by the plaintiff. On this point their Lord-

(1) (1859) Sud. D. Rep. 1353

(2) 1864 Suth. W. R. (Gaz. No.) 191.

(3) 16 Suth. W. R. 5 (Privy Council).

By marks of
old houses,
trees,
mounds, or
vestiges of
boundaries.

ships observed that it would have been an error in point of law, if the Court below had said that it was conclusive of the question, when the surface of the land had all been changed and the marks had all been obliterated, so that no houses, or trees or mounds, or vestiges of boundary could be found, and all the surface of the land was fresh land which had been brought down by the river, notwithstanding the fact that the channel of the river had changed and had gone from one bed to another. Later on in the judgment of the same case, their Lordships further said :—" They (the Judges) meant merely to say that, as a matter of fact, which no doubt was a material fact to ascertain, there were none of the marks of the old cultivation upon it which the defendants had alleged. If any marks of the old channels, or of the old houses, and of the trees, and of the old mounds, could have been found, that would have been conclusive against the plaintiff, and therefore it was a matter very material to be inquired into. It did not necessarily follow, nevertheless, that because no marks were found, therefore the plaintiff had proved his case, but it does not appear that that objection was ever taken "

In the case of *Maharani Indurjeet Koor v. Mohunt Jumna Das* (1), where the point raised in appeal was, whether the finding of the court below was sufficient to prove the identity of the land in suit as being the property of the plaintiff. While affirming the view of the Court below in that case, Hobhouse, J., said thus :—"The Court finds that khitta A (plot 1) is and has been the property of the plaintiff, and there is no dispute before us but that it is so. It then finds that on khitta B (plot 2) there was originally a house, and well — the property of the present plaintiff. It then finds that what is called a pyne or rivulet came in from the river and formed a disjunction between khitta A and khitta

(1) 14 Suth. W. R. 164 (Civ.).

B, sweeping at the time the surface of khitta B ; but the pyne is now closed up, and the river has returned to its proper channel . and in the surface of khitta B there still remain the foundation of the house, and the well which are the marks that the lands unmistakably belonged to the plaintiff. So that, in fact, the court seems to us to have found that the substratum of the land has never been diluviated and is still traceable, subject only to a certain surface of sand which has been deposited upon it. This seems to us to be a decision on the question of fact which sufficiently identified khitta B as the property of the plaintiff."

By the foundation of a house, and well.

In the case of *Nogendra Chunder Ghosh v. Mahomed Esoff* (1), their Lordships of the Judicial Committee referring to the case of *Musst Imam Bundi v. Hargobind Ghosh* (2), said thus :—"The former is a clear authority that the identity of the site may be established by maps and ancient documents ; although by the long submergence of the land, all external marks and means of identification have been obliterated. It is not, however, very clear in that case whether the question between the parties was one of boundaries of the original estates, or of dispute between one party claiming the land as a re-formation on his original land, and the other claiming it as an accretion under the first Clause of the 4th section of the Regulation." In the last but one paragraph of the same judgment, their Lordships further observed : "Their Lordships are not insensible to the difficulties of identification, and to the danger of encouraging claims of this kind on insufficient evidence. They lay down no rule as to the strictness of proof which the Courts in India may require in such cases." These were the observations made by their Lordships of the Judicial Committee in connection with a case in which the land was

By maps and ancient documents.

(1) 10 Beng. L. R. 406 : 18 Suth. W. R. 113.

(2) 4 Moo I. A. 403 : 7 Suth. W. R. 67 (P. C.).

claimed as having reformed on the original site. But it seems quite clear that these observations are also applicable to the cases of reformed lands other than those reformed on the original site.

In *Rai Krishan Chandra v. Saidan Bibee* (1), the learned Judges of the Allahabad High Court drew their conclusion, relating to the identification of land which was submerged and subsequently reformed on the opposite bank, from the maps showing the course of the river which submerged and cut away the lands of Mouzah Poha from time to time, as also from the *khasra* which showed the quantity of lands diluviated at different times.

No hard
and fast rule
relating to
the evidence
of identity.

It would seem to follow from the decisions, cited above, that no hard and fast rule was laid down as to the nature of proof that our Courts of Justice would require, to establish the "identity" of the lands carried away from one side of the river to the other. Under ordinary conditions of things, land detached bodily from one side of the river and united to the opposite bank is capable of identification and recognition by old habitations, houses, buildings, mounds, and marks of former cultivation, trees, etc. In fact, any difficulty would seldom arise in cases of avulsion, when a river separates a considerable piece of land bodily from one estate and joins it to another without submergence or diluviation. In such cases, it will be only a question of fact to inquire whether the portion separated bodily was, or was not, a part of a particular estate and this can be determined by direct oral testimony (2). But, in those cases, where complete submergence of land on one side is followed by subsequent re-appearance on the opposite bank, with obliteration of all external marks which would have been otherwise preserved but for submergence or diluviation

(1) I L. R. 28 All. 256 (258).

(2) *Maharane Indurjeet v. Mohunt Jumnâ Das*, 14 Suth W. R. 164.

of it, it would be a question of inference to be drawn from the evidence oral and documentary. The decision in the cases, cited before, where re-appearance of land on the opposite bank has been held to be governed by the principle of Cl. II, Sec. 4, will evidently support this view. In *Mustt. Imam Bundi v. Hui gobind* (1), the land in dispute was inundated about the year 1784: it remained under water till about 1801, it then became partially dry, till in the year 1814, it was again inundated. After this period it once again re-appeared above the surface of water, and by the year 1820 had become very valuable land (adjoining to the opposite bank). In this case, maps and other documents were referred to for the purpose of determining the original ownership of the land, and according to the conclusion drawn from them it was held that the land in dispute belonged to the original owner. See also the case of *Rai Krishan Chandra v. Sardan Bibi* (2).

Onus of proving Identity or Recognition :—In cases where the contest would be between the plaintiff claiming under the *rule of avulsion* and the defendant resisting the claim under the *rule of accretion*, the onus is *prima facie* upon the plaintiff to prove that the land separated and joined to the side of the defendant is his, as being capable of identification and recognition as part of his estate. But, when the *prima facie* case is established by evidence of identity or recognition by the plaintiff, the onus is shifted upon the defendant to prove his case of accretion. (See the cases cited in pp. 334-338 *ante*). With regard to the question of onus, Mr. C. D. Field in his "Unrepealed Regulations of the Bengal Code" added the following notes under Cl. 2, Sec. 4, Reg. XI of 1825 :—"Where there has been an accretion or accession of soil to a person's estate, the *prima facie*

Onus upon the plaintiff, and when upon the defendant.

(1) 4 Moo. I. A. 403 (413).

(2) I. L. R. 28 All. 256 (260-261).

presumption of law is that such accretion has been made by alluvion and not by avulsion, and the burden is thrown upon the party claiming by avulsion of showing that such soil so joined has been suddenly severed from his own estate and been transferred to such other estate. And the reason of this is clear. A forcible and sudden breaking away of land is an unusual phenomenon and therefore the presumption from nature is, that every accession of land is an alluvion until the contrary is established" (1).

Principle of Clause II, Sec. 4, applies with reference to rivers of all kinds :—While discussing the nature of rivers which are to be dealt with under the law laid down by the Regulation, it has been said that the rivers are to be chiefly divided into four classes, namely, (1) tidal, (2) non-tidal, (3) navigable, and (4) non-navigable, (see page 21 *ante*). Now, a question arises whether the principle of law stated in Cl. II, Sec. 4 would apply to the cases occurring in all of the above classes of rivers. On principle, it seems to be clear that no distinction is to be made in the application of the above principle with reference to the nature of the river. Cases of avulsion may take place whether the river be tidal or non-tidal, and navigable or non-navigable. It does not appear that any such distinction was ever suggested in the Roman, English and American laws. The law on this subject has been stated in general terms which point to the conclusion that the above principle is applicable to the cases of all kinds of rivers under those systems of law. The French Civil Code specifically states that no distinction is to be made in the application of the above principle of avulsion, whether the river be *navigable or non-navigable*. [See p. 329 *ante*].

Applicable
to navigable
and non-
navigable
rivers.

Turning to the Regulation itself, it will be seen that

(1) Unrepealed Regulations of the Bengal Code by C. D. Field, p. 586.

there is nothing to suggest that Cl. II of Sec. 4, was not intended to apply to the cases of avulsion, whether they be in tidal and non-tidal waters, or in navigable and non-navigable rivers. "Sources of contentions and affray" and "claims and disputes" may arise in respect of land broken through and separated in tidal or non-tidal waters, as well as in navigable or non-navigable rivers. All these were intended to be provided for by the law declared by the Regulation. In fact, if the decided cases, cited before, be looked into carefully, it will be found that no discussion as to the nature of the river was considered relevant in any of them. In connection with this point, what their Lordships of the Judicial Committee of the Privy Council said in the case of *Ritraj Kunwar v. Surfaraz Kunwar* (1) may be quoted :—"It appears to their Lordships that this is one of the cases provided for by the second clause of the fourth section of the Regulation, which enacts that the rule as to gradual accretion 'shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may, by the violence of the stream, separate a considerable piece of land from one estate and join it to another estate without destroying the identity, and preventing the recognition, of the land so removed. In such cases the land, on being clearly recognized shall remain the property of its original owner.' This is in accordance with the English law, as laid down in the case of *The Mayor of Carlisle v. Graham* [(1869) L. R., 4 Ex., 361 at p. 368 ; for the passage quoted, see p. 330 *ante*]..... It is, perhaps, unnecessary to add that although the specific reference in that case is to a tidal river, their Lordships consider the principle equally applicable to a non-tidal river."

Applicable
to tidal and
non-tidal
rivers.

(1) I L. R. 27 All. 655.

"Clearly recognized":—What would constitute recognition of the land carried to the opposite bank has been discussed under the head of "Evidence of Identity and Recognition." (1). As to the meaning of the word "clearly" reference may be made to what has been said regarding "clear" under "Clear and Definite Usage" (2).

Persons
entitled to
the rule of
avulsion.

"Original Owner":—Under this head, the persons who are entitled to the benefit of the *rule of avulsion* may be stated. This point does not appear to have been much discussed by our Judiciary as in the case of the *rule of accretion*. But it seems to be clear that the persons who are entitled to the rule of accretion, can also claim under the rule of avulsion when the circumstances of a case justify the applicability of such rule. There does not seem to be any difference on principle in regard to the applicability of the above rules with reference to the persons who can claim the benefit under them. Cl. II, Sec. 4, is only a qualification of Cl. I, in other words, as it has been said before, (see pp. 331-332 *ante*) the rule of avulsion has been enacted by the Regulation as an exception to the general rule of accretion declared by Cl. I, Sec. 4. Consequently, it can be maintained that the exception would apply to the cases of all who are entitled to the operation of the general rule, when the conditions, under which the rule of exception is applicable, are established. This view may be supported by what was laid down by Sir Richard Couch, in the case of *The Court of Wards v. Radha Proshad Sing* (3). In that case, the plaintiff respondent having failed to establish his claim upon a title by accretion, relied upon Cl. II, Sec. 4 of the Regulation to support the judgment of the Court below. In overruling that contention, the learned Chief Justice said thus:—"Now, this Clause (Cl. 2. S. 4.) does not apply in a case like the present so as to give to the

*Court of
wards
v.
Radha
Proshad
Sing.*

(1) See pp. 349-352 *ante*.

(2) See page 190 *ante*.

(3) 22 Suth. W. R. 238 (243)

plaintiff the ownership of the land, if he has not acquired it by the operation of the first clause. It is in fact a qualification of the first Clause, and says that it shall not be applicable where there is a sudden change in the course of the river. The plaintiff is so far right in his construction that if he could show that the land which he claims had become his property by the operation of the first Clause, the second would not take it away from him. But that is very different from the second Clause giving to him the property when he has not acquired it by accretion. And, according to the law as laid down by the Judicial Committee, he has not a title by accretion."

"Then it also says that, in such cases, that is of a sudden change in the course of a river, the land on being clearly recognized, which was the case here, shall remain the property of its original owner. 'Original owner' does not mean the person who may for a time have had possession of the accreted land without having acquired a right to the site of it. The original ownership must include the ownership of the site, and if the plaintiff has not acquired that, this Clause can not operate to give him a right to the land."

From the above interpretation which was put upon the expression "original owner" it follows that the person who may claim under the operation of the rule of avulsion must have some kind of permanent interest in the land or estate from which "a considerable piece of land" is separated. Mere temporary possession of "an estate" from which land may be disjoined by the action of a river will not attract the operation of the rule of law laid down in Cl. II, Sec. 4. Thus the permanency of the interest of some kind is the test of the applicability of the *rule of avulsion* in the case of the *rule of accretion*. [See p. 255 *ante*].

Exceptions to the rule of avulsion :—By sec-

An exception to the rule of avulsion, proved by the existence of the custom of the deep stream rule.

tion 3 of Regulation XI of 1825, it has been laid down that the rules declared in the several clauses of section 4, will apply subject to any local usage to the contrary; consequently, it is to be taken that the rule of avulsion stated in Clause II, Sec. 4 should be read subject to the condition laid down by Sec. 3, namely, that this rule will not apply if any local usage to the contrary is established. The custom referred to is the deep-stream rule which restricts the application of the rule of avulsion. While dealing with "Custom and Usage" under section 2 of the Regulation, it has been shown that in Bengal and the North Western Provinces, an assertion of a custom like that was made, but in no case it was established. (See pp. 182-186 *ante*). It is only in the Punjab, which is pre-eminently known as the land of customs, that the existence of such custom has been established. In view of this state of things only the reported decisions of the Punjab cases are referred to below.

Punjab cases

Now, in regard to the proposition that the application of the rule of avulsion is subject to the custom of the deep-stream rule, reference may be to the case of *Noordeen v. Futeh Ali* (1), where a piece of land was carried bodily across from mouza Maboota to mouza Bukriallee which was possessed by the defendant. It was held in that case that the plaintiff was entitled to that piece of land as the parties admitted that the case was to be governed by section 4 of Regulation XI of 1825. In the case of *Rama v. Shere Sing* (2), it has been laid down by the Punjab Chief Court that, if there be no local custom to the contrary, land carried away to the opposite bank of the river may be followed by its owner, provided it be identifiable. In that particular case it was held that there was no sufficient proof of a custom taking the place of the rule laid down in Regulation XI of 1825.

(1) (1869) Punj. Rec. 65.

(2) (1872) Punj Rec 15.

In *Bhanu v. Balanda & Falsl* (1), it was held that, in the absence of the custom of *kishtibunna* in that part of the Sutlej, the original proprietors were entitled to the land which was thrown up in recognizable form.

Next, turning to the cases where the rule of avulsion was abrogated by the custom of the deep-stream rule, reference may be made to the decision in the case of *Sodha v. Fulleh Khan* (2). In that case, it was held that the *kishtibunna* or deep-stream rule, i. e., the transfer both of the proprietary right and of cultivating possession followed the transfer of the land from one bank of the deep-stream to the other and that this change of property and cultivation took place even when the land was transferred bodily to the opposite bank by a sudden change in the course of the stream. In *Mahar Singh v. Achra* (3), the plaintiff claimed the land which was transferred to his side by avulsion of the Soan river relying upon the deep-stream rule. The defendant contended, *inter alia*, that though the rule that the deep-stream should be the boundary was prevalent on the Soan, the rule was only applicable to lands which had been transferred from one bank to another by gradual accretion, and that it was not applicable when the land had been transferred by avulsion. Upon this contention, it was held by the Chief Court that the general custom, in accordance with a strict observance of the deep-stream rule, was applicable in that tract of the province, whether or not, the land had come over by avulsion and was identifiable. See also *Hasim v. Nathu* (4).

The Local Government, in the Punjab, has been empowered by Sec. 101 A of the Punjab Land-Revenue Act (No. XVII of 1887), as amended by the

Local Government to fix the boundary between riverain estates,

(1) (1879) Punj. Rec. 48.

(2) (1869) Punjab Rec. 56.

(3) (1883) Punjab Rec. 164.

(4) (1900) Punjab Law Report. p. 347; (1900) Punj. Rec. 13.

which
abrogates the
rule of
avulsion.

Punjab Act, No. 1 of 1899, Sec. 2, to fix the boundary between riverain estates. A boundary line so fixed shall be deemed as permanently fixed when approved by the Financial Commissioner. The effect of fixing a boundary between riverain estates has been laid down in section 101B of the said Act, in the following words:—"Every boundary line fixed in accordance with the provisions of Sec. 101 A shall, notwithstanding any law, or custom, or any decree or order of any Court of law, to the contrary, be the fixed and constant boundary between the estates affected thereby, and the proprietary and all other rights in every holding, field, or other portion of an estate situate on each side of the boundary line so fixed shall, subject to the following proviso, vest in the land-owners of the estate which lies on that side of the boundary line on which such holding, field, or other portion of an estate is situate."

It seems that the above provisions expressly made by the Revenue Law of the Punjab was intended to abrogate the rules declared by Regulation XI of 1325, as the words—"notwithstanding any law or custom or any decree or order of any court of law, to the contrary," used in section 101 B, would apparently indicate.

ALLUVION AND DILUVION.

SECTION 4, Clause Third.

Third. —When a *char* or island may be thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river or sea between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government. (1)

Chars thrown up in navigable river.

But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land tenure or tenures of the person or persons whose estate or estates may be most contiguous to it, subject to the several provisions specified in the first clause of this section with respect to increment of land by gradual accession.

Property therein when channel fordable.

Islands in tidal and navigable rivers, and in the sea :—Islands may be formed in a river or the sea either by the recession or sinking of the water, or by the accumulation or agglomeration of sand and earth, deposited in the bed, which, in process of time, becomes firm land and emerges out of the surface, environed with water. (2) There is another mode by which an island may be formed, *namely*, when an arm of a river or the sea divides itself and encompasses a part of the mainland.

The above three principal modes, in which islands may be formed in a river or the sea, are recognized by

[(1) See Bengal Act IV of 1868, which has been repealed in Assam by the Land and Revenue Regulation (1 of 1886)]. (2) 1 L. R. 39 Mad. 617 (625).

Ownership of
islands under
Roman Law.

the Roman Law. Under that law, an island arising in a river belongs to the riparian owners, but when an island is formed in the sea, it becomes the property of the first occupant. When an island is formed by the third mode, its ownership continues in the person to whom such land belonged before. Upon the question of ownership, Justinian declares the law thus :—"When an island is formed in the sea which rarely happens, it is the property of the first occupant ; for, before occupation it belongs to no one. But when an island is formed in a river, which frequently happens, then if it occupies the middle of the river, it belongs respectively to those who possess the lands near the banks on each side of the river, in proportion to the extent along the banks of each man's estate. But if the island is nearer to one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. But if a river divides itself at a certain point, and lower down unites again, thus giving to any one's land the form of an island, the land still continues to belong to the person to whom it belonged before (1)."

Justinian.

Colquhoun.

Colquhoun, in his "Summary of the Roman Civil Law," adds a qualification to the law laid down above to the effect that "this is to be understood where the lands on each side have not any certain limits and bounds; for if they have, there can be no claim or title to such an island, but it belongs to the occupant." (2)

Grotius.

Grotius, in his *De Jure Belli et Pacis*, on the ownership of islands, says thus :—"For if we look at the general case, peoples occupied the land, not only as lords, but as owners, before it was assigned to private proprietors..... What was thus occupied by peoples, and was not afterwards distributed, is to be considered as belonging to the people ; and as in a river

(1) Institutes of Justinian by Sandars, pp. 99—100.

(2) Summary of the Roman Civil Law by Colquhoun, sec. 982.

which is private property, an island which makes its appearance, or a deserted river-bed, is the property of the private person ; so in a public river, both of these belong to the people, or to him to whom the people has given them.' (1)

While dealing with the difference of the rule of *alluvion* from that of an *island*, Grotius, in his same work, says as follows :—" But since we have said that the rule respecting an island is different from the rule for alluvium, a controversy often arises which of the two a piece of ground is, when there is an elevated promontory connected with the nearest land by a plain which is under water : which perpetually happens with us on account of the inequality of the ground. Here usages vary. In Gueldres it becomes part of the land, provided it be occupied and can be visited with a loaded cart : in the land of Putten, as far as a man on foot with a sword in his hand can reach. The most natural rule is, that an island should be considered as separate from the land when there is a strait through which a ship can commonly pass " (2)

Whether an elevated promontory under water near the bank is an accession to it - view of Grotius.

Thus, from the commentaries on the Roman Civil Law by Colquhoun a proposition of law relating to the ownership of the island in a public river can be deduced, *namely*, that, if an island arise in a *public river*, where the riparian lands on each side of it have fixed limits and bounds, it belongs to the first occupant in the same way as an island in the sea. But Grotius seems to think that such islands would belong to the nation, if there was no distribution of it to private persons ; in other words, such an island would be public property. Next, Grotius deals with the question whether the

(1) *De Jure Belli et Pacis*, Lib II, Cap. VIII, s 9 (1). (By Whewell pp. 402-403)

(2) *De Jure Belli et Pacis*, Lib II, Cap. VIII. S. 14. (by Whewell, p. 408).

"elevated promontory which is under water," lying between the bank and the island, would be an accretion to the bank or a part of the island. This he answers by referring to the usages in Holland, where, in one part, according to the custom, it will be an accretion to the bank, if it be occupied and can be visited with a loaded cart ; and in another part, so far of it is an accretion as can be reached by a man on foot with a sword in hand. Such elevated ground, in his view, will be a part of the island, if the space between the bank and such land be deep enough to admit the passage of a ship. The law thus laid down by Grotius with regard to to an "elevated promontory which is under water," by which he means alluvial accessions of land to the bank, not of sufficient height so as to emerge above the surface of the water, is analogous to the rule of law, declared by the second part of Clause III of the Regulation, where the fordability of a stream, under similar circumstances, has been laid down, as a test to determine the accession of an island to the riparian bank.

Ownership of
islands under
the French
Civil Law.

The law relating to the ownership of islands as laid down by the French Civil Code is to the following effect ;—"Islands, islets, and accumulations of mud formed in the bed of rivers or streams navigable, or admitting floats, belong to the nation, if there be no title or prescription to the contrary" (1). "If a river or other stream in forming itself a new arm, divide, and surround a field belonging to the proprietor of the shore, and thereby form an island, such proprietor shall retain the ownership of his land, although the island be formed in a river or in a navigable stream or one admitting floats." (2)

It will, thus, appear from the above that, under the French Civil Code, islands or islets thrown up in navi-

(1) Code Napoleon by Richards, § 560.

(2) *Ibid* § 562.

gable rivers (meaning rivers admitting floats) are presumed to be public property, unless the contrary be proved by title or prescription. This evidently shows that, under the French Law, a private individual may acquire a title to the bed of a navigable river either by grant or prescription ; and when that title has been acquired, such private owner becomes the owner of the islands or islets formed in such bed. "Property in the soil imports property above and beneath." (1)

In regard to islands, formed by an arm of a river or the sea dividing itself and surrounding a field belonging to the proprietor of the shore, the law, under the French Civil Code, is evidently similar to the Roman Law, stated before.

The law of England in regard to islands arising in the sea, or, in the arms, creek, or haven thereof, has been declared by Lord Hale in the following terms :— "Of common right and *prima facie*, it is true, they belong to the Crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private property of a subject, will belong to the subject according to the limits and extents of such propriety. And therefore if the west-side of such an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of the *filum aquæ* invironed with water, the propriety of such island will entirely belong to the lord of that manor of the west side ; and if the east side of such an arm of the sea belong to a manor of the east side *usque filum aquæ*, and island happen between the east side of the river and the *filum aquæ*, it will belong to the lord on the east side ; and if the *filum aquæ* divide itself, and one part take the east and

Ownership of
islands in
tidal
navigable
rivers under
English Law.

(1) Code Napoleon by Richards § 552.

the other the west, and leave an island in the middle between both the *fla*, the one-half will belong to the one lord, and the other to the other. But this is to be understood of islands that are newly made; for if a part of an arm of the sea by a new recess from his ancient channel encompass the land of another man, his propriety continues unaltered..... For the propriety of such a new accrued island follows the propriety of the soil, before it came to be produced," (1)

Ownership of islands is an incident of the ownership of the bed.

According to the law of England, the subject may make title to islands arising in tidal water in cases where the bed and soil of such tidal water were in the subject before the island arose, but not to islands arising in the open sea or tidal rivers where the ownership of the bed has remained in the Crown. (2)

It would, thus, seem that, under the law of England, the title to islands is regarded as an incident of the ownership of the bed. So, it is now proposed to discuss the law in England relating to the ownership of the bed of a tidal navigable river and of the sea.

"Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Paramount against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the common law of the realm, acknowledge and declare it to be his ancient and indisputable right."

King's ownership of the bed.

"The dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea. 'The sea is the King's proper in-

(1) Hale "De Jure Maris" Cap. VI. (by Moore, p. 405.)

(2) Moore's History of the Foreshore, p. 654.

heritance', and he is 'Lord of the Great Waste,' both land and water; *in aqua quam soli.*"

"This dominion not only extends over the open seas, but also over all creeks, arms of the sea, havens, ports, and tide-rivers, as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of the tides, are part and parcel of the sea itself, and subject, in all respects, to the like ownership" (1).

The soil of the sea, estuaries, and navigable rivers, within the British dominions, was originally in the Crown and remains so still, except in those cases where it can be proved to have legally passed into the hands of private persons. This position is well supported by the opinion of text-writers and decided cases. In England, the question of the ownership of the beds of tidal and navigable rivers arose chiefly in relation to fishery disputes, as the right of fishery according to the English law is indissolubly connected with the title to the bed.

In *Malcomson v. O'Dea* (2), which is known as the *Shannon case*, it has been laid down by the House of Lords that the soil of all navigable tidal rivers like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery there in is *prima facie* in the public.

Similarly, in the case of *Gann v. The free Fisheries of Whitstable* (3), it has been ruled by the House of Lords that the bed of all tidal and navigable rivers and of all arms of the sea is in the Crown, but is for the benefit of the subjects.

In *Neill v. Duke of Devonshire* (4), Lord O'Hagan said thus:—"The right of the Sovereign exists in every navigable river where the sea ebbs and flows. Every

*Neill v.
Devonshire.*

(1) Hall on the Sea-Shore by Moore, pp 668-669.

(2) 10 II. L. 593.

(3) 11 H. L. 192.

(4) 8 App cas. 135 (1857).

such river is a royal river and the fishing of it is a royal fishery, and belongs to the Queen by her prerogative" His Lordship, next, in support of the view, quoted the following passage from Lord Hale (*De Jure Maris*, Chap. IV. p. 11):—"The right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or in land river."

*Lyon v.
Fishmonger's
Co.*

In the case of *Lyon v. Fishmonger's Company*, (1) Lord Selborne, while speaking of the difference between the streams above and below the limit of the tides, said thus:—"The most material differences between the stream above and the stream below the limit of the tides are, that in an estuary or arm of the sea there exist, by the common law, public rights in respect of navigation and otherwise, which do not generally (in this country) exist in the non-tidal parts of the stream; and that the *fundus* or bed of the non-tidal parts of the stream belongs, generally, to the riparian proprietors, while in the estuary it belongs generally to the Crown." See also *Lord Advocate v. Hamilton* (2); *Orr Ewing v. Colquhoun* (3); *R. v. Stimpson* (4); *Att-Gen. v. Chambers*, per Alderson, B (5); *Blundell v. Catterall*, per Byles, J. (6); *Murphy v. Ryan* (7), and *Lord Fitzhardinge v. Purcell* (8).

As to the opinion of text-writers, reference may be made to what was said by Lord Hale in *De Jure Maris*, (see p. 365 *ante*) where his view has been quoted. See also Phear on Rights of Waters, p. 11, and Angell on Tide Waters, Chap. I.

(1) 1 App. Cas. 662 (682). (2) 1 Macq. II L. 46

(3) 2 App. Cas. 839 (854). (4) 4 B. & S. 301.

(5) 4 De. G. M. and C. 206. (6) 5 B. and Ald. 304

(7) 11 R. 4. C. L. 143. (8) [1908] L. R. 2 Ch. Div. 139 (166)

Thus, it is apparent from the above authorities that, in England, the ownership of the bed of tidal navigable rivers is, *prima facie*, vested in the Crown, and that such ownership will be presumed, unless the right of a private individual to such bed is proved by *grant* or *prescription*. It is also established that the title to the island in tidal and navigable rivers or in the sea follows the property in the bed. See also the decision of the Privy Council, in *Srinath Roy v Dinabandhu Sen* (1), where their Lordships dealt with the right to fishery in England as an incident of the ownership of the bed.

"Island" "in a large navigable river" "or in the sea":—Now, turning to the Regulation, it may be affirmed at the outset that an island in tidal navigable rivers or in the sea, as understood within the meaning of Clause III, means land surrounded by water, not subject to be submerged by the flow of ordinary tides, and capable of being employed for cultivation, pasture or other useful purposes. An island as defined above is to be distinguished from the bed. Merely a sand-bank which remains under water for one part of the year and is left dry in the dry season, is not an island but a part of the river bed. Till the land rises beyond ordinary high-water mark in such a way as to become fit for cultivation, it is part of the river bed. [See *Maharane Narain Kumari v Nabib Azim of Benga'* (2) and *Nabin Kishore v. Jogesh Pershad* (3)]. The rule laid down by these two decisions relating to the height, which a sand-bank is to attain before the right of private property accrues to it, is applicable to the cases of islands referred to in Clause III, because the word "island" in that clause is mentioned as capable of being possessed by private proprietors as well as by Government, and the above decisions lay down that a private proprietor can not have any right to

An island under cl. III is defined as subject of private property.

Islands distinguished from the bed.

— (1) I. L. R. 42 Cal. 489.

(2) 4 Suth. W. R. 41, Civ.

(3) 14 Suth. W. R. 352.

a sand-bank or strip of land in the bed of a public navigable river which remains under water at ordinary tides and is dry at ebb. Hence, it follows that an island in a public navigable river to be a subject of private property must not be merely a sand-bank, washed by the ordinary flow of the tide, but land not subject to be submerged except at extraordinary high tides. This is how an island is distinguished from the river-bed or sea-bottom.

Modes of
formations
indicated by
"thrown up."

Islands
distinguished
from alluvion.

"Thrown up" :—It has been said before that islands in tidal and navigable rivers or in the sea may be formed chiefly by three different modes :—*first*, by the recession or sinking of the waters thereof, *secondly*, by the accumulation or agglomeration of sand and earth deposited in the bed (1), and a formation by the *third* mode occurs, when an arm of a river or the sea divides itself and encompasses a part of the main land. Now, a question arises whether the *churs* or islands referred to in Cl. III, Sec. 4, do include islands formed by all the above modes. To this our answer would be in the negative. The expression "thrown up" used in Cl. III makes it clear that "a *chur* or island" in that clause does not mean an island formed by the third mode stated above. Any question relating to an island formed by the third mode will be governed by the principle involved in Clause Second and the provision of Clause Fifth. By "thrown up" it is evidently indicated that the *chur* or island mentioned in Clause III means islands formed by the above two modes, namely, by the recession or sinking of the waters, and by the accumulation or agglomeration of sand and earth deposited in the bed, which subsequently become *terra firma*; in other words, islands in that clause mean islands formed by the vertical raising of the river bed. Such an island is to be distinguished from *alluvion* which is a longitudinal accretion to the riparian land on public navigable rivers (see, p. 101 *ante*). In the case of

(1) I. L. R. 39 Mad. 617 (625).

islands in public navigable rivers, the presumption of ownership is in favour of the Crown, whereas in the latter case, such presumption is in favour of the riparian owners.

Next, it may be maintained that there is nothing in the Regulation to show that there would be any difference in the application of the provisions laid down by Clause III, whether an island be thrown up *gradually* or *suddenly*. It is quite easy to think of cases where an island is thrown up gradually, that is, by the gradual processes of nature, as it happens very often. But an island thrown up suddenly is a phenomenon of rare occurrence. Instances of islands being thrown up suddenly will be found when land is raised out of water by a convulsion of nature, such as, by earth-quake. Land formed by the sudden raising of the bed of a public navigable river or of the sea, has been held to be land gained by sudden *dereliction* or *recess* of the river or sea: *Fajat Kishore v. Sheik Mia Chand* (1). If land in the case be an island and such island be regarded as land gained by *dereliction*, the view expressed there, would be inconsistent with what the Regulation says in the following passages of Sec. I (Preamble):—"churs or small islands, are often thrown up by *alluvion* in the midst of the stream or near on of the bank." It would seem from these words that the framers of the Regulation did not intend to include *churs* or islands within lands gained by *dereliction*, (*see pp. 211-217 ante*).

Thrown up
gradually or
suddenly.

The right of Government to such islands can be supported by what Lord Hale said, regarding islands arising in the sea, in the following passage:—"As touching islands arising in the sea, or in the arms or creeks or havens thereof, the same rule holds, which is before observed touching acquets by the reliction or recess of the sea." (2). It has been stated before that "islands rising

(1) 5 Cal. L. J. 47n (notes). (2) Hale "*De Jure Maris*," Chap. VI.

Churs thrown up need not be qualified by *alluvion* in its strict legal sense.

de novo in the king's sea, or the king's arms thereof" were always understood by his Lordship to be the property of the Crown (see p. 212 *ante*). Thus, islands arising in the sea gradually or suddenly are to be governed by the rule that the right to the island follows the ownership of the bed, as in the case of sudden dereliction.

In this view, the word "alluvion" in the passage "chars or small island are often thrown up by alluvion in the midst of the stream" in Sec. I (Preamble), need not be taken to mean *alluvion* in its strict legal sense, that is, an increase by gradual and imperceptible degrees to the riparian land (See pp. 96-100 *ante*).

'The bed of which is not the property of an individual :—'

Clause III applies to beds which are public property.

The above words, inserted within brackets, in Cl. III, Sec. 4, indicate that the provisions laid down by the Third Clause are applicable to cases where the ownership of the bed is vested in Government; in other words, where the bed is part of the public territory, as would be apparent from the view expressed by L. S. Jackson, J, in the case of *Monee Lall Sahoo v. The Collector of Saran* (1). There, the learned Judge, in overruling the contention that the law laid down by the Privy Council in the case of *Felix Lopez* is to be applied to a case between rival proprietors, not between the Government and a private party, observed :—"It seems to us that that would be too restricted an application of the decision of the Privy Council. They appear distinctly to lay down that Cl. 3, Sec. 4, contemplates only cases where the land which has come into existence has been gained or derived from a large navigable river or from the sea, and in respect of which there have been no previous rights of property." By "previous rights of property" the learned Judge evidently meant the property which had

(1) 14 Suth. W. R. 424 (425).

not been owned by private owners, and which is consequently part of the public domain. It, thus, becomes necessary to discuss the ownership of the bed of large navigable rivers or of the sea. In this country, as in England, such ownership is *prima facie* vested in Government representing the Crown. This position is well-established as will appear from the cases cited below :—

Ownership of the bed of navigable rivers or the sea is *prima facie* vested in Government.

Bengal cases

In *Gureeb Hossein Choudhuri v. G. Lamb* (1), it has been laid down by the learned Judges of the Sudder Dewany Adawlut of Calcutta that Regulation XI of 1825, which is declaratory of the common law of this country as well as by the common law of England, the bed of a navigable river, that is, a river in which the tide ebbs and flows, is not the property of any individual, consequently the right of fishery in such a river is not a private property. This decision would seem to limit the ownership of the Government as far as the tide ebbs and flows

In *Doe dem. Scebbisto v. The East Indian Company* (2), it was held by the Privy Council that the East Indian Company as representing the Indian Government had freehold in the bed of navigable rivers in India.

The above two cases were followed, in *J. G. Bagiam v. The Collector of Bhullooa* (3), where the point in controversy related to a fishery dispute, and in delivering the judgment in that case, Morgan J., observed — 'It is settled that the beds or channels of navigable rivers are ordinarily the property of the Government. Subject to the right of navigation and such other rights as the public have to the use of navigable rivers, those rivers and the soil over which they flow belong to the State.'

In the case of *Nabin Kishore v. Jogesh Prosad* (4), it has been laid down by the Calcutta High Court that so long as the bed of a navigable river is washed

(1) (1859) Cal S. D. R. 1357.

(2) 6 Moo. I A. 267.

(3) 1864 Suth. W. R. (Gap No) 243.

(4) 14 Suth. W. R. 352.

by the ordinary flow of the tide at a season when the river is not flooded, it remains *publici juris*; or if vested in any one, it is vested in the Crown, not under Regulation XI of 1825, and for mere fiscal purposes, but as representing, and as it were, a trustee for the public.

In the case of *Chunder Faleah v. Ramcharan Mookerjee* (1), the point under notice arose, in connection with a fishery dispute. In that case, the authority of the decision in *Gureib Hossein's* case, cited above, with regard to the ownership of the bed of a tidal navigable river like the Meghna, was upheld, but it was laid down that the bed of a navigable river could also be the property of a private individual.

In the well-known case of *Nagendra Chunder Ghose v. Mahomud Esoff* (2), their Lordships of the Judicial Committee, while speaking of the distinction between a tidal and a navigable river, observed: "In India the point thus taken seem to be concluded by the authority of the decided cases. The learned counsel did not contend for a distinction between a tidal river and a navigable river which has ceased to be tidal. Their Lordships have no reasons to suppose that in India there is any much distinction as regards the proprietorship of the bed of the river."

*Satowri
Ghose v.
Secretary of
State.*

In the case of *Satowri Ghose v. The Secretary of State for India* (3), the question under consideration arose in connection with fishery disputes. There, Ghose, J., after reviewing the previously decided cases, stated the opinion of the Court thus: "Upon the cases that we have just referred to, it may be accepted as law on this side of India that the bed of a tidal and navigable river is vested in the Crown; and that the right of *jalkar* (fishery) in such river, as also the bed of the river itself, may be granted by Government

(1) 15 Suth. W. R. 212. (214).

(2) 10 Beng. L. R. 406; 18 Suth. W. R. 183.

(3) I. L. R. 22 Cal. 252 (257).

(Whether it be in the exercise of their prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property, subject of course to the right of navigation and such other rights which the public has in such rivers."

See *Jagadindra Nath Roy v. Secretary of State for India* (1).

In the case of *Srinath Roy v. Dinabandhu Sen* (2), while discussing the inexpediency of applying the common law rule of England to a Bengal case, their Lordships said :—"The freehold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is vested in the Government of India in the right of the Crown. [*Doct dem. Seebkrista v. E. I. Co.* (6 Moo. I. A. 267), *Nagendat Chunder Ghose v. Mahomed Esaf*, (10 B. L. R. 406)]. Where the bed thus forms part of the public domain, the public at large is *prima facie* entitled to fish. Thus the English analogy has been closely followed." Thus, their Lordships reaffirmed the doctrine relating to the ownership of the beds of tidal and navigable rivers in India, as laid down in those two cases.

In the well-known Bombay case of *Baban Mayach v. Nagn Shrivacha* (3), Sir Michael Westropp, upon the point under notice, said thus :—"From *Doct dem. Seebkrista v. E. I. Company* (6 Moo. I. A. 267) it would appear that Her Majesty's Privy Council were of opinion that the beds of navigable tidal rivers in British India, are vested in the State. The similar rule of law as to beds of such rivers in Great Britain and Ireland, already mentioned, was thus laid down by Lord St. Leonards in *The Lord Advocate v. Hamilton* (1 Macq H. L. 46). 'With respect to the question which has been mooted as to the rights

(1) I. L. R. 30 Cal. 291 (298)

(2) I. L. R. 42 Cal. 489 (525-526) : 18 Cal. W. N. 1217.

(3) I. L. R. 2 Bom. 19 (42-43).

of the Crown to the *alveus* or the bed of a river, it really admits of no dispute; beyond all doubt the soil and bed of a river (we are now speaking of navigable rivers only) belong to the Crown. In *Bagiam v. The Collector of Bhulloora* (1864 suth. W. R. Gap No. 243), although the plaintiff established his right to a private fishery in certain tidal and navigable rivers, the principles laid down, in *Chunder Falleah v. Ramchandra Mukerjee* (15 Cal. W. R. 212) and *Doe dem. Seebkrishito v. The East Indian Company* (6 Moo. I. A. 267) were adopted and approved." In the next paragraph, the learned Chief Justice lays down that the proposition that the beds of tidal rivers in British India are, like those of such rivers in Great Britain, *prima facie*, to be regarded as vested in the Crown, is established.

Madra cases.

In the case of *Viresa v. Tatayya* (1), the Madras High Court observed: "Inasmuch as the property in the soil is presumed to vest in the sovereign power on behalf of the public where private ownership of the soil is not proved, the right to fish in the waters which flow over it, can be asserted in England only in virtue of a grant from the sovereign power." The law of England was next applied to that Madras case.

In *Secretary of State for India v. Kadiri Kutti* (2), the Madras High Court after discussing the law of England on this point, laid down thus:—"There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India, in the absence of local usage or statutory enactment to the contrary. The rule that the Government is the owner of the soil in the bed of a navigable river up to high water mark is recognized in the Regulation XI of 1825, see *Felix Lopez v. Madan Thakoar* (13 Moo I A. 467),

(1) I. L. R. 8. Mad. 467 (470).

(2) I. L. R. 13 Mad 369 (375).

and it was further recognized by the Judicial Committee in the case of *Doe dem. Seebkristo v. The East India Company* (6. M. I A 267)."

In the case of *Secretary of State for India v. Rajah Chellikani Ram Rao* (1), Lord Shaw, in delivering the judgment of their Lordships of the Privy Council, quoted *first* the view expressed by Lord Parker, (then Parker. J.), in the case of *Lord Fitzhardinge, v. Purcell* [(1908) 2 Ch. Div. 139 (166)] with approval, in the following words:--"..... Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and *a fortiori* the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of *inclementa maris* seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that

*Secretary of
State v.
Raja
Chellikani
Rao.*

(1) I. L. R. 39 Mad 617; 20 Cal. W. N 1311; L. R. 43 I. A 192.

Private ownership by the doctrine of a fordable channel.

According to the law of England, which has been discussed briefly in the foregoing pages (365—368 *ante*), it would seem to be settled that the right to an island follows the ownership of the bed. If it arises in a tidal navigable river or in the sea, the bed of which is vested in the Crown, it belongs to the King. But if the ownership of the bed has been acquired by a subject previous to the formation of such island, it shall belong to him. In England, as in India, such bed may belong to a subject either by grant or by prescription. In this country, the law on this point established by decided cases seems to be similar to that of England except that the doctrine of a *fordable channel* is peculiar in this country.

Chunder Jelea v. Ram Churn.

As to the ownership of the bed of a navigable river by a private individual, reference may be made to the case of *Chunder Jelea v. Ram Churn Mukherji* (1), where Glover, J., in delivering the judgment, observed: "In the next place, I do not understand that Regulation XI of 1825 enacted 'that the bed of a navigable river could not be the property of any individual.' On the contrary, the Regulation appears to me directly to recognize the fact that the bed of such river might become the property of an individual proprietor, as in the case of an island between which and a riparian proprietor the water might be fordable." In *Fugdish Chunder Biswas v. Chowdhury Zuhoor ul Huq* (2), Maikby, J., on this point said thus:—"The judgment of the Lower Appellate Court contains an error which is fatal to the decision. The Subordinate Judge states that 'a flowing or current river cannot form the right of any proprietor of land.' This is an error. As is clearly shown by the Regulation to which the Subordinate Judge refers, the bed of a flowing stream may be the property of a private person."

(1) 15 *Suth. W. R.* 212 (214).

(2) 24 *Suth. W. R.* 317.

In the case of *Mohini Mohan Das v. Khajah Assanullah* (1), the bed of a navigable river was held to be part of an estate owned by private owners, [See also *Satcowri Ghose v. Secretary of State for India* (2)]. As to the ownership of a new bed formed in the land of a private proprietor by the sudden irruption of a navigable river, the following observations of their Lordships of the Judicial Committee, in the case of *Srinath Roy v. Dinabandhu Sen* (3) may be referred to: "Again the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable . . . the flooded land-owner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None the less he remains the owner, and should the waters permanently retire, his full rights as owner revive, unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part."

In regard to the ownership of the river-bed in large navigable waters acquired by long possession, there does not appear to be any decided case in this country, which can be cited as illustrative of the position that the title to such river bed was acquired against Government by adverse possession for over sixty years. But the proposition that a private proprietor can acquire the ownership of a public river-bed by prescription from which a grant may be presumed, seems not to have been disputed. Cases in this country in connection with the ownership of river-beds arose chiefly in relation to fishery disputes, and the decided

Ownership of river-beds in private lands.

Ownership of river-beds as evidenced by Thak and Revenue Maps, proving possession referable to title.

(1) 17 Suth. W. R. 73.

(2) I. L. R. 22 Cal. 252.

(3) I. L. R. 42 Cal. 489.

cases refer to instances in which fishery rights were acquired by prescription or custom: [See *Gureeb Hossain v. Lamb* (1); *Viresi v. Talayya* (2); *Narasayya v. Sami* (3); *Biban Mayacha v. Nagu Shrivucha* (4); *Hari Das Mal v. Mahomed Faki* (5); *Satcowri Ghose v. Secretary of State for India* (6); *Abhoy Charan v. Dwarkanath* (7). But in those cases where the beds of large navigable rivers were claimed as a part of permanently settled estates, and in which such claims were established after treating the Thak and Revenue Survey Maps, which are only evidence of possession at the time when these maps were prepared, as evidence of title, it might have been said that the rule of long possession referable to title was held applicable [See *Mohini Mohan Das v. Khaja Assanoollah* (8)]. In such cases, possession at the time of Thak or Revenue Survey, is presumed to be based upon the title by grant at the time of the Permanent Settlement. Thus the title to the river-bed in public and navigable waters may be established by the presumption of long possession to be inferred from the entries in the Thak and Survey Maps, which is referable to a grant at the time of the Permanent Settlement, there being nothing to the contrary in the meantime. This view can be supported by what was laid down by the Calcutta High Court, in the case of *Satcowri Ghose v. The Secretary of State for India* (6). In that case, the bed of a tidal navigable river was claimed as appertaining to a permanently settled mehal on the basis of the Thakbust demarcation which showed the bed as included within the Mehal. The Court of First Instance gave a decree in favour of the plaintiff, specially relying upon the Thakbust. The

*Satcowri
Ghose v.
Secretary of
State.*

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- (1) 1859 Beng. Sud D. R. 1357. (2) 1 I. L. R. 8 Mad. 467.
 (3) 1 I. L. R. 12 Mad. 43. (4) 1 I. L. R. 2 Bom. 19.
 (5) 1 I. L. R. 11 Cal. 434. (6) 1 I. L. R. 22 Cal. 252
 (7) 1 I. L. R. 39 Cal. 53. (8) 17 Suth. W. R. 73.

Court of Appeal below reversed that decision holding that the *thakbust* demarcation was the best proof of possession at the time of the *thak*, but was no evidence of title. The mere fact that the river was demarcated as appertaining to the mouzah raises no presumption that it was let out to the proprietor as part and parcel of that mouzah at the time of the Permanent Settlement. This decision was set aside in second appeal to the High Court; and while remanling the case, Ghose, J., said thus :—"The *thakbust* operations of 1855 having been conducted, as we presume, under the rules thus laid down by the Board of Revenue, and the portion of the river now in dispute having been demarcated by responsible Government officers as part of the estate *towzi* No. 1, the *thakbust* map becomes an important piece of evidence in favour of the plaintiff [see in this connection *Syama Sundari Dassya v. Jogobundhu Sootar* (I. L. R. 16 Cal. 186), as also an unreported case, Appeal from original decree No. 5 of 1890, decided on the 1st September, 1890 by Macpherson and Amir Ali, JJ.] No doubt, as has been observed by the Subordinate Judge, such maps are evidence of possession at the time: but he forgets that as such evidence of possession they are also evidence of title, as has been laid down in several cases in this Court." This decision was approved by their Lordships of the Judicial Committee, in *Jagadindra Nath Roy v. Secretary of State for India* (1). In that case, it has been held that as evidence of possession *thak* and survey maps may be treated as evidence of title, upon the rule of law that long and undisputed possession is attributable to title. On this point what was observed by Mookerjee, J., in the case of *Maizuddi Biswas v. Ishan Chunder Das* (2) may be quoted :—"Now it cannot be disputed that the *thak* map is valuable evidence of possession, and as evidence

Thak map as evidence of possession is also evidence of title.

*Maizuddi
Biswas v.
Ishan
Chandra.*

(1) I. L. R. 30 Cal. 291 : (2) 13 Cal. L. J. 291 (297).

of possession, it is also valuable evidence of title. In support of this proposition, reference need be made only to the case of *Satcowri Ghose v. Secretary of State for India* (1) which was subsequently approved by their Lordships of the Judicial Committee in the case of *Fagadindra Nath Roy v. Secretary of State for India* (2). In ordinary cases, the *thik* map is used primarily as evidence of possession of the party who relies thereupon, and as soon as it is established from the *thik* map that the claimant was in possession at that time, such possession may legitimately be attributed to title." In the same case, the learned Judge further observed :—"Possibly in some of the cases to be found in the books, specially in the cases of *Nabo Coomar Dass v. Gubind Chandra Roy* (3), *Abdul Hamid Mian v. Kiran Chandra Roy* (4), and *Syima Sunder Dasya v. Jagobundhu Sootar* (5), the proposition is stated too widely and language is used which might justify the contention that the backward presumption. *presumuntur retro*, applies as an inflexible rule. The decision of the Judicial Committee, however, shows that this view can not be maintained." From the following portion of the judgment, it would seem that the learned Judge was of opinion that "the backward presumption" would not apply to *char* land where the condition might vary from year to year according to the course of the river. With reference to the above decision of the Privy Council, in the case of *Fagadindra Nath Roy, Mitra and Caspersz, JJ.*, in delivering the judgment in the case of *Dunne v. Dharani Kanta Lahiri* (6) said thus :—"Fagadindra Nath Roy v. Secretary of State for India (2) is not an authority for the proposition either that a survey map is insufficient evidence to establish

(1) I. L. R. 22 Cal. 252.

(2) I. L. R. 30 Cal. 291.

(3) 9 Cal. L. R. 305

(4) 7. Cal. W. N. 849.

(5) I. L. R. 16 Cal 186.

(6) I. L. R. 35 Cal 621 (628).

title or that it is conclusive evidence of title. It is cogent evidence and may alone be the foundation of a decree declaring title, if the evidence afforded by it is not rebutted. It is for the Court dealing with facts to ascertain its probative force in each particular case." In the case of *Dunne v. Dharani Kanta*, the plaintiff claimed three-fourths of the bed of the Brahmaputra river locally known as *Daokoba* as appertaining to his mouzah Manikdiar in the district of Mymensingh. The *thakbust* (1852-53) map filed by the plaintiff showed that a twelve annas share of the river-bed formed or about to be formed belonged to the plaintiff, and a four annas share appertained to pergunnah Jafursahi. The river in question was navigable and its course was subject to constant changes. After discussing the character of the river, Mitra and Caspersz, JJ., expressed their view on the evidentiary value of the *thak* map in the following words :—"It might be that a change had occurred only a few years before the *thakbust* map was prepared, and that the effect of the change had been to submerge a large portion of the village Manikdiar. The survey party in 1852-53 might have obtained satisfactory evidence of the fact, and recorded the river-bed to be private property and not property of the Government. We can not hold, from the mere fact that the river was navigable, that the statement in the *thak* map is erroneous. The statement is good evidence against the appellant, who had evidently no title to put forward to the river-bed in this part of its course" (1). That above view would seem to be supported by the latest decision of the Privy Council, in the case of *Haradas Acharya Chowdhuri v. Secretary of State for India* (2).

*Dunne v.
Dharani
Kanta.*

(1) I. L. R. 35 Cal. 621 (625).

(2) 46 Cal. L. J. 590.

Thus, the title to river-beds in large navigable waters, established upon the evidence of Theek and Revenue Survey Maps, under the operation of the rule that they are not only evidence of possession but as such evidence of possession, they are also evidence of title, is akin to the right established by prescription founded upon a lost grant.

Title to islands in navigable rivers, the beds of which are owned by individuals, follows the ownership of such beds.

Now, reverting to the original topic of the ownership of the islands thrown up in the beds of navigable rivers which are owned by individuals, it may be affirmed that the title to such islands follows the ownership of the bed, as the words—"the bed of which is not the property of an individual" would apparently indicate (1). This doctrine is also clearly deducible from what was laid down by the Judicial Committee, in the case of *Lopes v. Madan Mohan* (2), in the following passage:—"The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained." (See p. 102 *ante*, where an island has been discussed as a vertical accretion to the river-bed). It is well known that the owner of the soil is the owner of it upwards and downwards to an indefinite extent, for it is a maxim of law, *cujus est solum, ejus est usque ad cælum*; upon this principle it can be maintained that the owner of the beds of tidal navigable rivers is the owner of the islands formed in such rivers. In this view, the Third Clause of Sec. 4, does not apply to the cases in navigable rivers, the beds of which are private property: (see page 268 *ante*). It has also been discussed before that the riparian owners on the banks of navigable rivers are not entitled to the benefit of Clause I, Sec. 4, when the bed of such a river belongs to a different private proprietor: (see pp. 265-270 *ante*). Thus, Clauses I and III having been held to be inap-

(1) See pp. 378-380 *ante*.

(2) 13 Moo. I. A. 467.

plicable to navigable rivers, the beds of which are owned by private proprietors, there remains nothing in the Regulation which can affect the proposition that the ownership of the island follows the ownership of the bed, whether in navigable or non-navigable rivers, where the bed is owned by private individuals.

"A large navigable river":—The word "large" before "navigable" has been considered to be very significant. In fact, the expressions "large" and "navigable" have been held to apply to such rivers as the Ganges and Meghna in Bengal where navigation can be carried on always. The fact of a river being non-fordable is not sufficient to bring it within the definition of a large navigable river. This was the view expressed by Mr. Justice (E) Jackson, in the case of *Mohini Mohan Dass v. Khaja Assanoolluh* (1), where the learned Judge said:—"The Goomtee, though a deep river, would not come within the definition of a large navigable river. Even, then, if the words of the Section, which state that the bed of such river is not the property of individuals, are declaratory of the law on the point, that section would not apply to this case. It is urged that the river is not fordable; but even if it is not fordable, it does not follow that the river comes within the definition of a large navigable river. Every river can to some extent be used by boats; but the words 'large and navigable' must be held to apply to such rivers as the Ganges and Meghna, upon which navigation can be always carried on." It would seem that word "large" has been used by the Legislature in order to avoid the difficulty which would have arisen, if the word "tidal" was used. In this country, there are cases where it has been held that the fact of a river being tidal does not necessarily establish its navigability. A tidal river in India may be non-navigable: (see pp. 26 & 40. *ante*).

Significance of "a large navigable river."

Probable explanation why the word "large" and not "tidal" has been used.

Islands "in the sea":—While discussing the "Extent of the Sea under the Regulation," it has been said that the word "sea" as understood within the meaning of the Regulation includes the "territorial waters," and not the whole of the open sea : (see p. 74 *ante*). Hence, it may be maintained that if an island thrown up in the sea be connected by a ford with the shore, such island must be an island thrown up by the sea within that extent. The application of the provisions of the Regulation can not be extended to an island beyond that limit. This view may be supported by what was said by the Privy Council in the following Madras case :—

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Chellikani
Rao.*

In the case of the *Secretary of State for India v. Raja Chellikani Rao* (1), the lands in dispute were islands which had been formed in the bed of the sea near the mouth or delta of the river Godavari. These islands were within a short distance, much under three miles of the mainland, and covered with jungle. The Crown desired to constitute them into a reserved forest, but the Zemindars objected and claimed the lands as theirs. Their claim was allowed by the Madras High Court. In reversing the decision of the Madras High Court, their Lordships of the Judicial Committee said :—
"The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water. At what date soever they appeared, they were in the high seas at a point thereof not far from the shore of the mainland and in these circumstances, in the opinion of the Board, they were Crown property."

"The case is not complicated by any point as to geographical situation; the question of whether a limit from the shore seawards should be beyond three

(1) 1 L. R. 39 Mad. 617 : 20 Cal. W. N. 1311.

miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terræ*—no such questions arise here. The point is geographically within even three miles of British territory; at that point islands have arisen from the sea. Are those islands no man's land? The answer is, they are not, they belong in property to the British Crown." In the following portion of the judgment, their Lordships considered the law of England on the point, and then came to a conclusion which was expressed in the following passage:—"In the opinion of the Board, this is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire." (See "Extent of the Seacoast." pp. 85-88 *ante*.)

It may be contended that the decision of the Privy Council in the above case was not governed by the provisions of the Regulation, as it does not apply to the Presidency of Madras. (See "Local Extent of Regulation XI of 1825" p. 177 *ante*). This is evidently true, but the decision being a decision of a general proposition of law relating to an island within the "territorial limits" it is applicable to all the provinces; and the operation of the law declared by the Regulation can not extend beyond what is known as the territorial limits of the Indian Empire (see p. 74 *ante*.)

"The channelmay not be fordable":—

According to the rule laid down by the *first* part of Clause III, Sec. 4, of the Regulation an island thrown up in a large navigable river, surrounded by an unfordable channel belongs to the Government. It sometimes happens that the channel which was at first unfordable, becomes subsequently fordable, and joined to the mainland in the course of time. A difficulty then arises whether the *first* part, or the *second* part

Conflict of judicial opinion in the interpretation of the conditions of the two parts of clause III.

of the Clause would be applicable to the cases of this description. At first sight it would seem that the conditions stated in the two parts of the Clause are successive and not opposite, that is to say, if the channel be unfordable at its first appearance, it is to be at the disposal of the Government; and on the channel becoming fordable at any season of the year, it will belong to the riparian owner whose estate may happen to be most contiguous. The result according to the above interpretation may be stated thus that the Government will be vested with the right of ownership of the *char* at the time of its first appearance, but will be divested of such right on the channel becoming fordable at any season of the year.

Decisions holding that the condition of not being fordable until disposed of by Government is meant.

Mohini Mohan v. Juggobundhu.

Another interpretation was placed upon the two parts of Clause III by Sir Barnes Peacock, by which the learned Chief Justice evidently meant to get over the difficulty of vesting and divesting of the ownership of the *char*. His view will be apparent from his following observations made in the case of *Mohini Mohan Das v. Juggobandhu Bose* (1): - "If, when the island first formed, the river Bawor was not fordable between the plaintiff's estate, which formed that part of the shore which was nearest to the island, the island might according to the clause 3 have been disposed of by the Government. If, before the Government disposed of it, the river between the plaintiff's estate Kootubpore and the island became fordable, then, according to clause 3, it would belong to the plaintiff as the owner of Kootubpore." In this case, the learned Chief Justice re-affirmed what he laid down on a former occasion, in the case of *Kowar Paresch Narain Roy v. Watson and Co.* (2) on the point under discussion. This view would require that the time after the formation of the island and before the disposal of it by Government should be taken into consideration.

(1) 9 Suth. W. R. 312 (315)

(2) 5 Suth. W. R. 283 (285).

The above modes of interpretation of the two parts of Clause III were further complicated by the provisions of Act IX of 1847. Sections 5 and 6 of that Act speak of changes during the period between two surveys, and the orders for assessment of revenue are to be passed on the *status* discovered in the second survey. The provisions as made by that Act induced the Court to hold that the *status* at the time of original formation is not to be looked to, but the *status* at the time of re-survey alone is to be considered. This view was expressed in the cases of *Wise v. Ameerunnissa* (1) and *Wise v. Moulvie Abdool Ali* (2). In the last case, it has been held *per* Bayley and Campbell, JJ., that by Act IX of 1847 Government reserves its right under that Act till the period of re-survey and that the *status* at re-survey, and not the *status* at the time of the formation of the land is to be looked to in the adjudication of such claims. Thus, where before a re-survey land attaches to that of a riparian proprietor, and its *status* is that which under Clause III gives that proprietor a right, which the opposite party cannot defeat unless a better title than an award under Act IV of 1840 be proved. This view was followed in the cases of *Wise v. Ameerunnissa Khatoon* (3) and in *Kowar Paresh Narain Roy v. Watson and Co.* (4).

Next, a third mode of interpretation of the two parts of Clause III was suggested in the case of *Mussumut Tabira v. The Government* (5), where Loch and Macpherson, JJ., observed as follows:—"This case cannot be treated as coming under clause 1, section 4, Regulation XI of 1825, for the lands in litigation are evidently not a gradual accretion to the original lands of the plaintiff's village of Dinapore, but have formed

Decisions laying down that the status of not being fordable at the re-survey is meant.

Wise v. Ameerunnissa

Decisions holding that the condition of not being fordable at the time of formation is meant.

Mussumut Tabira v. Government.

(1) 2 *Suth. W. R.* 34.

(2) *Ibid.*, p. 127.

(3) 3 *Suth. W. R.* 219.

(4) 5 *Suth. W. R.* 283.

(5) 6 *Suth. W. R.* 123 (125).

opposite to it in the shape of an island, there being a running stream between it and the mainland. If the island *at the time of its formation* were surrounded with water unfordable at any time of the year, the Government, as sovereign, would have undoubted right, under clause 3 of the above law and Act IX of 1847, section 7, to take possession." This decision evidently meant to say that *unfordability* was to be looked to at the time of the formation of the island.

In *Mohini Mohun Das v. Fuggobundhu Bose* (1), the land came up originally from the river as a small island, and gradually joined on to the plaintiff's estate after it had been taken possession of by the defendant. It was held by Trevor, J., disagreeing with Glover, J., that the Government alone was entitled to the land, and not the plaintiff to whose estate land had adjoined. This decision was reversed on appeal under section 15 of the Letters Patent. [See *Mohini Mohun Das v. Fuggobandhu Bose*. (2)]

*Kalee Pershad
v. Collector of
Mymensingh.*

In the case of *Kalee Pershad Mojoomdar v. The Collector of Mymensingh* (3), the plaintiff who lost his case in the Court of First Instance, in appeal to the High Court, contended that the land having formed as an island in a navigable river, and the *damoos* or gulf which separated the disputed land from mouzah Beara having become fordable within the last few years, the land must be deemed to have become an accession to his mouzah Beara from the time when the *damoos* became fordable, and that his cause of action accrued from that time, and therefore his suit was not barred by limitation. In overruling this contention, Norman, J., said as follows:—"If that argument is well founded, the absurd consequence would follow that, though land originally formed as an island had been occupied and

(1) 7 *Suth. W. R.* 103.

(2) 9 *Suth. W. R.* 312.

(3) 13 *Suth. W. R.* 366.

cultivated for 20 or even 50 years, still, if the channel between it and the mainland be filled up, the rights of the person in occupation of the island would be destroyed, and the riparian owner could acquire a right of possession which he might enforce by suit at any time within 12 years after the channel dried up or became fordable** I think that the true rule is that a question as to the right to the possession of land, either gained by gradual accretion or reformation or thrown up in a river or the sea, must be determined by an enquiry into the condition of land, when it was originally gained by alluvion or thrown up, and became the subject of property and capable of cultivation or occupation as such." The learned Judge, then, referred to the Roman Law which had been discussed before in this book: (see pp. 362-364 *ante*). Continuing upon the same point, Mr. Justice Norman further observed:—"It is difficult to see how a right, which has once accrued, can be divested by any change in the condition of land adjacent to that in which such right exists, and therefore one would think that, if land comes into existence, and becomes the subject of property as an island in a navigable river, the fact that the channel between it and mainland dries up subsequently cannot destroy the rights of property or possession which any person may have acquired in it while it continued to be an island." In regard to the decisions which held that the *status* at the re-survey should be looked to, Norman, J., in the same case, said as follows:—"I confess myself unable to assent to the rule supposed to be laid down in *Wise v. Ameerunnissa Khatoun* 2, Weekly Reporter, 34, that the *status* of the land at the time of the re-survey is to be looked at in determining questions between rival claimants when the Government is not one of such claimants"(1).

The divergence of judicial opinion in the interpreta-

(1) See p. 391 *ante*.

The last view
accepted by
the Full
Bench in
Budroonissa
v.
Prosunno
Coomar.

tion of the two parts of Clause III, Section 4, discussed above, induced (L. S.) Jackson and Glover, JJ., to refer the matter to a Full Bench, in the case of *Budroonissa Chowdhraïn v. Prosunno Coomar Bose* (1). In that case, it has been held unanimously by the learned Judges constituting the Full Bench that, in a suit regarding the right to a *chur* or island thrown up in a large navigable river, originally surrounded by deep unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the state of things existing at the time when the *chur* or island is thrown up or formed, is the criterion by which the right either of the Government or of the owner of the contiguous land is to be determined with reference to Clause III, Section 4, Regulation XI of 1825.

Thus, the conflict of opinion regarding the interpretation of the conditions of the two parts of Clause III was set at rest by the decision of the Full Bench in the above case, which upheld the third mode of interpretation, namely, that the condition at the time of formation of the island is to be looked to for the purpose of determining the right of Government and private proprietors under Clause III.

Affirmed by
the Privy
Council in
Wise v.
Ameerunnissa

The decision of the Full Bench, in the case of *Budroonissa Chowdhraïn v. Prosunno Coomar Bose* (1), appears to have been approved by the Judicial Committee of the Privy Council, in the case of *Wise v. Ameerunnissa Khatoon* (2). In that case, the land in dispute originally appeared as an island surrounded by an unfordable channel, which subsequently became fordable from the Kalkini side, which belonged to the Government, who put Ameerunnissa (defendant-respondent) in possession of it under a new settlement. It was contended on behalf of the plaintiff appellant that the Government could not, in consequence of the provisions of

Act IX of 1847, include the lands which are now in dispute with chur Kalkini without a new survey. In dealing with the point, their Lordships observed:—"Even if the Government was not entitled to assess the lands in consequence of Act IX of 1847, they were entitled to take possession of them as lands which originally formed as an island, and were, at their first formation, surrounded by water which was not fordable, and they were entitled to oust the plaintiffs, who were trespassers and to put the defendant into possession" (1). In the middle of the judgment (at p. 252) of the same case, their Lordships further noticed the divergence of judicial opinion relating to the time of fordability and quoted with approval the view expressed by the High Court in the above Full Bench Ruling. (See also *Wise v. Amce-runniisa Khatoon*, 24 *Suth. W. R.* 435). This fact leaves no doubt that the above Full Bench decision on the point that the state of things at the time of the formation of islands is to be looked to, for determining the rights under Clause III, Section 4, was upheld by the Privy Council.

The result of the Full Bench ruling, in the case of *Budroonissah Chowdhraim v. Prossunno Coomar* (2), was that the decisions of the Calcutta High Court which held that the conditions referred to in Clause III meant the *status* of an island until it had been disposed of by Government or the *status* at the re-survey as indicated by the provision of Act IX of 1847, were overruled. It would always be a question of fact in each case what is the precise time, when the chur could be properly said to be thrown up or formed: per Couch, C. J., in the above case of *Budroonissah v. Prossunno Coomar*.

Now, it appears that the above Full Bench decision was passed on the 17th August 1870, and that an express provision was made by Sec. 4 of (B. C.) Act IV of

Full Bench
decision and
Act IV of
1868 (B. C.)

(1) 6 Cal. L. R. 249 (254).

(2) 14 *Suth. W. R.* 25 (F. B.)

1868 (The Bengal Alluvion Act, 1868 which received the assent of the Lieutenant-Governor of Bengal on the 8th June, 1868, and of the Governor-General on the 24th idem), to the following effect—"Any island of which possession may have been taken by the local revenue authorities on behalf of the Government under section 3 of this Act, shall not be deemed to have become an accession to the property of any person by reason of such channel becoming fordable after possession of such island shall have been so taken." It is apparent that this section has great bearing upon the determination of the question referred to the Full Bench in the above case. It does not seem clear why no reference was made to the Act at all.

"According to established usage" :—

The insertion of the above words in Cl. III may be due to the view of Harrington regarding the *established usage* of Bengal.

In this connection what Mr. J. H. Harrington, (a Judge of the Sudder Dewany Court and who had a hand in the drafting of the Regulation), says regarding the *estab'ished usage* of Bengal, may be quoted. In a note to his Analysis of the Bengal Regulations, after citing the provisions of the Civil Law as stated by *Vattel* (in the Law of Nations, Book I, Ch. XXII, see p. 54 *ante* of this book), he adds :—"This statement of the Civil Law corresponds exactly with the established usage of Bengal. The most difficult question is, when *churs*, or islands, are thrown up in the middle of a river, or on the seacoast, to whom does the property of them appertain? In the latter case indeed, when the *char* is not immediately annexed to the contiguous estate, so as to come within the rule of gradual accession, there seems to be no doubt that the island belongs to the State. In the large rivers also, such as the Ganges, Meghna, and Burrumpooter, if a *chur* be thrown up in the middle of the river, or in any part where there is no fordable channel on either side, it is, I believe, according to *established usage*, considered to belong to Government.

But if there be a ford on either side, it is deemed an accession to the estate connected with it by the ford. In small rivers, belonging to individuals, the right to a *chur* newly thrown up would of course vest in the proprietor of the bed of the river where the *chur* is formed" (3).

Under the head of the "Provisions of Hindu Law on the Subject" (see pp. 164-173 *ante*), it has been said that there does not appear to be any rule of Hindu Law expressly made for the purpose of governing the cases relating to *churs* thrown up in a large navigable river or in the sea. In the answer given by the P. of the Benares Hindu College in 1804, no such provision of the Hindu Law was mentioned (see p. 172 *ante*). In the opinion which is reported to have been given by the Hindu Law Officers of the Sudder Dewany Adawlut, the following passage occurs:—"In land appearing above the sea, not being connected with the shore, the right of the sovereign exists." The authors of the opinion referred to the texts of Vihaspati in support, but they did not cite them: (see pp. 173 & 174 *ante*.) It would now seem that the Indian Legislature while enacting the provisions of Cl. III Sec. 4, was thinking that the rule relating to an island in the sea, as stated in the above opinion given by the Hindu Law Officers, was based upon an *established usage* of this country, mentioned by Harington in his Regulations of Bengal. It may be further explained by the theory of the common law that all unappropriated and waste lands are vested in the Crown. This view may be supported by what was said by the learned Judges of the Sudder Dewany Adawlat, in the case of *Gureeb Hossein v Lamb* (1), in the following passage:—"By Regulation XI of 1825

Other probable explanations of the insertion of the words "according to established usage" in Cl. III.

(1) Harington's Analysis of Laws and Regulations of Bengal, Vol. II, p 252 (Foot-notes)

(2) 1859 Cal. Sud. D. R. 1357.

which is declaratory of the *common law* of this country as well as by the common law of England, the bed of a navigable river, that is a river in which the tide ebbs and flows is not the property of any individual."

"At the disposal of Government" :—

Decisions
construing the
words "at the
disposal of
Government"
as authorising
Government
only to
dispose of.

An island thrown up in a large navigable river or in the sea when surrounded by an unfordable channel shall be at the disposal of the Government. The expression "at the disposal of Government" has been a subject of various constructions owing to its peculiar wordings. Act IX of 1847 by its several provisions suggests that the Government is not entitled to the ownership of the island but is only vested with the right of assessing revenue. In fact, the construction that the words "at the disposal of Government" mean that Government has only the power to dispose of the island for revenue and not to own it seems to be consistent with the provisions of Act IX of 1847. If the legislators intended that such islands should be owned by Government, nothing would have been easier for them than to use the word "belong to" in instead of "be at the disposal of." This view was apparently taken by Sir Barnes Peacock, in the case of *Kowar Pareesh Narain Roy v. Watson and Co.* (1), where the learned Chief Justice observed: "The Regulation does not say 'shall belong to Government,' but that the Government may dispose of it. If, however, the Government does not take possession or dispose of it for a year or so, and during that time the channel between the island and the adjoining land becomes fordable, the right of the Government to dispose of it would cease." This view was upheld by the learned Chief Justice also in the case of *Mohini Mohan v. Juggobundhu* (2).

*Kowar
Pareesh
Narain v.
Watson & Co.*

The point was raised directly in the case of

(1) 5 Suth. W. R. 283 (285)

(2) 9 Suth. W. R. 312 (315).

Khellut Chunder Ghose v. The Collector of Bhagulpur (1), where this argument was advanced, namely, that the words "at the disposal of Government" should be construed as giving only the power to dispose of. In overruling this contention, Loch and Norman, JJ., said: "We are of opinion that the words 'at the disposal of the Government,' mean that the property in, and absolute right of disposal, of the same, is vested in the Government, and not, as contended for by the appellants, that the Government have merely a right to the revenue. The Legislature throughout the Regulation in question is dealing with the right of property in newly-formed lands, and not merely providing for the right to assess revenue upon them." In the following portion of the judgment, the learned Judges dealt with the argument addressed to them in analogy to cases under Regulation VII of 1822.

In the case of *Wise v. Moulvie Abdool Ali* (2), Bayley, J., observed as follows.—"Then Regulation XI of 1825 placed them, if islands, *at once*, at the disposal of Government as its absolute property: if churs liable to resumption, they become *at once* open to assessment."

In some cases it has been laid down broadly that an island thrown up in a navigable river or in the sea, surrounded by an unfordable stream is the property of the Government. See *Mussamat Tabia v. The Government* (3), *Kalee Pershad v. The Collector of Mymensingh* (4); *Budroonissa Chowdhraïn v. Prosunno Coomar* (5); *Rani Surnomoyee v. Fardine, Skinner, and Co.*, (6). In the case of *Ameeroonnissa Khatoon v. Wise* (7), McDonell, J., in delivering the

Decisions
construing the
above words
as conferring
absolute
property upon
Government.

*Khellut
Chunder v.
Collector of
Bhagulpur.*

*Ameeroon-
nissa v.
Wise.*

(1) 1864 Suth. W. R. (Gap No.) 73

(2) 2 Suth. W. R. 127 (128). (3) 6 Suth. W. R. 123.

(4) 13 Suth. W. R. 366. (5) 14 Suth. W. R. 25 (F. B. Rulings).

(6) 20 Suth. W. R. 276. (7) 24 Suth. W. R. 435 (436).

judgment said thus : "The Full Bench Ruling of the 17 August 1870 (reported in Weekly Reporter, Volume XIV, Full Bench Rulings, p. 28) was referred to as showing that, under the terms of Clause 3 of Section 4 of Reg. XI of 1825, these lands being, at the time of their first foundation, the *property*, or to use the words of the Regulation, at the disposal of Government, they could not subsequently become vested in the plaintiffs or any one else." The above passage from the judgment of McDonell, J., was approvingly quoted by the Privy Council in the judgment of the case of *Wise v. Amecrunnissa Khatoon* (1), where their Lordships said — "Even if the Government was not entitled to assess the land in consequence of Act IX of 1847, they were entitled to take possession of them as lands which originally formed as an island, and were, at their first formation, surrounded by water which was not fordable, and they were entitled to oust the plaintiffs, who were trespassers, and to put the defendants into possession." From the last passage quoted it would be apparent that their Lordships of the Judicial Committee evidently meant to say that an island in a large navigable river would be the property of the Government, which sufficiently explains how the words, "at the disposal of Government" in the opinion of their Lordships, should be construed.

In the case of *Ananda Hari Basak v. Secretary of State for India* (2), while overruling the contention that when under Clause III, Section 4, Reg. XI of 1825, a *char* or island has come to be at the disposal of Government because it is surrounded on all sides by an unfordable channel, or because it has become an accession to the land held by Government, Government must be treated as a trustee for the public, Mookerjee, J., said : "In our opinion, it is not correct to say that when

(1) 6 Cal. L. R. 249.

(2) 3 Cal. L. J. 316 (334).

Government acquires property under clause (3) section 4, Reg. XI of 1825, either as an island surrounded by an unfordable channel, or as accession to lands held by Government, Government becomes a trustee for the public. Government is entitled to deal with the property in the same way as any other part of the territory of the State at its disposal." See also *Guru Das Kundu v. Kumar Basanta Kumar Ray* (1). The view taken above may also be supported by the provisions of section 3 of Act IV of 1868 (B. C.)

Rights incidental to property in Islands :—

The Government being vested with the ownership of an island in a large navigable river becomes entitled to all accretions thereto whether by alluvion or by dereliction of its water.

[See *Kallynath Roy v. J. Lawrie* (2) and *Ananda Hari Basak v. Secretary of State for India* (3)]. See also section 2 Act IV of 1868 (Bengal Council) which runs thus :—

"It is hereby declared that when any island shall, under the provisions of clause 3, section 4 of Regulation XI of 1825 of the Bengal Code, be at the disposal of Government, all lands gained by gradual accession to such island, whether from a recess of the river or of the sea, shall be considered an increment to such island, and shall be equally at the disposal of the Government."

But the fact of the Government having property in such island would not entitle it to take possession of the river-bed when the channel intervening between such island and the mainland dries up. This view of law was adopted by the Judicial Committee, in the case of *Ram Surnomoyee v. Fardin, Skinner, and Co.* (4), where their Lordships said — 'Though an island, or

(1) 14 Cal. W. N. 37 (321).

(3) 3 Cal. L. J. 316.

(2) 3 Suth. W. R. 122.

(4) 20 Suth. W. R. 276 (278).

land thrown up and surrounded by a river, may be vested in Government, it does not follow that, if the river, which separates the island from the mainland, dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of the first clause of section 4 of Regulation XI of 1825."

Government's failure to claim :—

Decisions holding that cl. 5, sec. 4 applies to such cases.

Kalee Pershad v. Collector of Mymensingh.

There are instances in which, although it was open to the Government to lay a claim to an island thrown up in a navigable river, yet the Government refused to take possession under the *first part* of Clause III, Section 4. It is now proposed to consider under this head how to determine the rights to such island under that circumstance. One opinion seems to be this that cases like the above are to be governed by the general principles of equity and justice as declared by Clause Fifth, Sec. 4. This view of law was adopted by Norman, J., in the case of *Kalee Pershad Mojomdar v. The Collector of Mymensingh* (1), where, in delivering the judgment, the learned Judge, referring to the 3rd Clause, of Section 4, Regulation XI of 1825, observed :—"The clause in question does not, in fact, provide for the case of an island thrown up in a river, which, at the time when it becomes capable of being occupied or cultivated, in other words, a subject of property, is separated from the lands most nearly adjacent to it by an unfordable channel, further than to declare that such island shall be at the disposal of Government. But if the Government does not think fit to lay claim to it, the case will fall within the 5th Clause of Section 4."

Now, *ex hypothesi* the island thrown up in a large navigable river as contemplated by Cl. III, Section 4,

(1) 13 Suth. W. R. 366 (370).

can neither be regarded as a reformation upon the diluviated land of any estate, nor as connected with any estate on the bank by a fordable channel; for in either case it will be a property belonging to an individual. Next, it being an island, no right of alluvial accretion can be set up to it. So the only right that can be asserted in respect of it is a title by possession. Hence, it follows that the general principles of equity and justice which are to be applied in determining the title by possession, ultimately mean that the prior possessor is to be maintained in possession. In such cases the person who occupies the island first, is maintained in possession by the Criminal Court, as against a claimant who may happen to oppose him. The opposing claimant is thus driven to the Civil Court to prove his title. The subject of dispute being an island in the bed of a public river, he is bound to fail to establish any title, and the result that follows is that prior occupation confers ownership of such islands except as against Government. The case of *Nabin Kishore Roy v. Jogesh Peshad Gangooly* (1), may be referred to as an exact illustration of the position stated above. It may be said that this state of the law is responsible to a great extent for the scramble for prior possession leading to frequent contentions and affrays, ending in blood-shed and murder, which the Regulation intended to put a stop to.

State of things following upon Government's failure to claim—title follows occupation.

To remedy this evil, it would seem, an effort was made to introduce the theory of *knaveish or dishonest possession*, to prevent the possessor from availing himself of the law of limitation, in the case of *Kowar Faresh Narain Roy v. Watson and Co.*, (2). In that case, Watson and Co. took possession of an island thrown up in a navigable river surrounded by an unfordable channel, which had subsequently become

Law of limitation prevents the application of the theory of *knaveish or dishonest possession*.

Kowar Faresh Narain v. Watson & Co.

(1) 14 Suth W. R. 352. (2) 5 Suth W. R. 283.

fordable by the recess of the river between the land in dispute and the northern bank. The plaintiff an owner of the northern side instituted the present suit against the Company for recovery of the *char* land after the channel had become fordable. *Sir Barnes Peacock*, in delivering the judgment, observed: "If they (Messrs. Watson and Co.,) took possession of land which they knew did not belong to them, they took (as the Civil Law calls it) a knavish possession. Speaking of possession and prescription, the Civil Law says. 'To acquire prescription, it is necessary to have possessed honestly and fairly, that is, that the possessor must have been persuaded that he had a just cause of possession and must have been ignorant that what he possessed did not belong to another person. And this integrity is always presumed in every possessor, if it is not proved that he has possessed with bad conscience, knowing the thing to be another's' (Domat's Civil Law, 2208, page 876) I do not mean to say that the fact of obtaining possession dishonestly or knavishly will prevent a man from availing himself of an express Law of Limitation. On the contrary, it appears from a note in the same book that it will not (*idem*, page 2209) "

"In the same note it is said: 'But as to the point of conscience, it is most certain that the length of time does not secure unjust possessors from the guilt of sin, and that, on the contrary, their long possession is only a continuation of their injustice.' " The learned Chief Justice, upon the same point, further said: "We allude to this point, not for the purpose of determining the question of limitation, but for the purpose of considering whether Messrs. Watson and Co. did in fact take possession as owners of Ramkristopur on the south bank as stated in argument, or whether they did not take it in right of their tenure as owners of a portion of the land on the north bank of the river and

as tenants of the remainder of that portion. In considering this question, we should not presume that Messrs. Watson and Co., took a knavish *or* dishonest possession, if their possession could be attributed to any state of facts consistent with honesty and integrity. If they took possession of an island, knowing that it belonged to Government, it would be just as knavish and dishonest as if they took possession of land which they believed to be the property of a private individual. It is quite as dishonest to take the land of another, knowing it to be his, as to take the goods of another." Notwithstanding the above observations, it would seem that dishonesty in obtaining possession would not prevent the possessor from being protected by the Law of Limitation. The above theory of *dishonest possession* was also referred to in the case of *Nabin Kishore Roy v. Jagesh Pershad Gangooly* (1), where it was held that the principle had no application.

The Law of Limitation being perfectly clear, no such contention would be acceptable by our Courts. Again, such possession against Government would not perfect any title except at the expiry of sixty years. But this view may be qualified by subsequent physical changes. If the intervening channel become fordable afterwards, the island may become an accession to the bank. This will evidently be another mode of determining the rights to such island when the Government may fail to lay a claim to it.

In the above-cited case of *Kowar Paresh Roy v. Watson and Co.* (2), Sir Barnes Peacock, in dealing with the right of the Government, when it failed to take possession at the first formation of an island, said as follows :—

"Therefore, as regards the Government, it appears to us that, although it was originally an island, and

Decisions holding that subsequent physical changes make the doctrine of a fordable channel applicable, and Government's title is lost.

(1) 14 *Suth. W. R.* 352.

(2) 5 *Suth. W. R.* 283 (285).

Government might at its first formation have taken possession of it, still, as the Government did not do so, and the river between the land in dispute and the shore is now fordable, the land formed by the recess of the river is an increment to the lands most contiguous to it and belongs to the owners of such land; therefore the Government, the only party who could have a title to it, have lost their title."

A similar view was taken in the case of *Golam Ally Chowdhury v. Gopal Lall Tagore* (1). In that case, it was admitted that the *chur* in dispute made its first appearance as an island surrounded by unfordable water in a large navigable river, and was at that time by law at the disposal of Government. Afterwards the channel between it and the shore of the river became fordable at a certain part. The Government did not assert its right previously to the occurrence of this event, and subsequently thereto, it declined to do so. Under these circumstances it was held that as soon as the channel became fordable, according to Regulation XI of 1825, Section 4, Clause 3, the *chur* became an accession to the land of the person or persons whose estate or estates on the bank of the river fell under the description of being "most contiguous" to it.

Assessment of revenue on Islands newly thrown up :—

The substantive provisions of law for assessing revenue upon newly formed islands have been made, as said before, (see p. 283 *ante*) by Clause 2, Section 3, of Regulation II of 1819. These provisions in regard to *churs* thrown up in the midst of a river or the sea were further supplemented by the enactment of Section 7 of Act IX of 1847. That Section ran as follows :—"And it is hereby enacted, that whenever, on inspection of any such new map, it shall appear to the local revenue

authorities that an island has become thrown up in a large navigable river liable to be taken possession of by Government under Clause Third, Section 4, Regulation XI of 1825 of the Bengal Code, the said local revenue authorities shall take immediate possession of the same for Government and shall assess and settle the land according to the rules in force in that behalf, reporting their proceedings forthwith for the approval of the Sudder Board of Revenue, whose orders thereupon in regard to the assessment shall be final. Provided, however, that any party aggrieved by the act of the revenue authorities in taking possession of any island as aforesaid shall be at liberty to contest the same by a regular suit in the Civil Court." This Section has been repealed by Section I of Act IV of 1868 (B. C.); and Section 3 of this Act can now be taken as dealing with the assessment of revenue of newly thrown up islands, in substitution of Section 7 of Act IX of 1847. Section 3 of Act IV of 1868 lays down as follows :—

"Whenever it shall appear to the local Revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under Clause 3 Section 4 of Regulation XI of 1825 of the Bengal Code, the local Revenue authorities shall take immediate possession of the same for Government, and shall assess and settle the land according to the rules in force in that behalf, reporting their proceedings forthwith for the approval of the Board of Revenue, whose order thereupon, in regard to the assessment shall be final. Provided, however, that any party aggrieved by the act of the Revenue authorities in taking possession of any island as aforesaid, shall be at liberty to contest the same by a regular suit in the Civil Court."

Now the difference between the provisions relating to islands in a large navigable river, made by

Act IX of 1847 and Act IV of 1868 is apparent. Under the Act of 1847, such islands were to be taken possession of at the time of decennial re-survey, but under the Act of 1868, the possession of such islands may be taken on behalf of Government immediately after their formation.

The assessment of revenue is to be made according to the rules framed by the Board of Revenue. Under both the Acts rights have been preserved expressly for an aggrieved party to contest the legality of the action of the revenue authorities in the Civil Court.

"**Fordable.**"—The word "*fordable*" literally means that which can be crossed on foot. But the physical conditions of this country made the construction of the word from the legal point of view a matter of great importance. A channel may be crossed on foot when the water is breast-high or knee-deep. It can be forded, in some cases, only in the dry season, but it may not be so in the rainy season. It may be crossed on foot straight from side to side or in a zig zag direction. To these, the difference in height of different men may be added. These are the considerations which render it necessary to look out for the judicial interpretation of the word "*fordable*" under the Regulation. In the Indian Alluvion Bill of 1881, this word was defined thus:—"A channel is said to be fordable when it does not exceed five feet in depth in the dry season next after the formation referred to and throughout the twenty-four hours." This definition, although it has not the force of law, at any rate shows that various circumstances are to be taken into consideration in defining the term "*fordable*."

As for the interpretation put upon the word "*fordable*" by reported decisions, reference may be made to the case of *Issur Chunder Sen v. Kalee Dass Hajrah* (1).

Fordable
channel
defined by
the Bill of
1881.

In that case, it was contended by the defendant appellant that, as it has been found that the water on the Furridpore side of the defendant could be crossed by people, it was *fordable* as contemplated by Clause 3, Section 4, of Regulation XI of 1825, and thus the defendant had as much right as the plaintiff who claimed the *chur* in suit from the Dacca side of the Pudda river. In dealing with this contention, Bayley and (E.) Jackson, JJ., said thus:—"That the water on the *Furreedpore* side can only be *forded* at any time by following, not any direct or usual ford straight from side to side, but only by taking, in a zig-zag direction, advantage of the higher portions of the bed of the river, and that even only with the water breast-high: while on the other, or *Dacca* side is generally a shallow, *i. e.*, water varying from 1 to $2\frac{3}{4}$ ths cubits only. It is argued that, if, even in this way, a person can get across, it is a '*fordable*' stream, and defendant can claim the land under the words of Regulation XI of 1825. The construction of a law must, however, in our mind, be *reasonable*, or, to use the words of Dwaris on Statutes page 550, Edition 1848, 'to construe the words according to the subject-matter in such a sense as to produce a *reasonable* effect, and with reference to the circumstances of the particular transaction.' Again, that interpretation is to be accepted which does not *intend* a *wrong*, page 551. Further, in page 552, 'not the words of the law, but the sense and reasons' are to be looked to. The law is to be interpreted, 'not according to the letter, but according to the meaning.' Now, if with the fact before us, that the main stream of the great river Pudda is on the *Farreedpur* side, that there is no general plainly recognized direct ford there, while on the *Dacca* side there is, without a shadow of doubt, only very shallow water and properly *fordable* in the reasonable and ordinary term of the word, would it be

Cases dealing with the interpretation of the word "*fordable*."

Issur Chunder v. Kulee Dass.

just or rational to with-hold from plaintiff his decrees ?" In the result, it has been held, in that case, that a river that can be crossed zig-zag in the dry season only when the water is breast-high, is not a "*fordable*" stream within the meaning of Clause 3, Section 4, Regulation XI of 1825.

In the case of *Wise v. Ameeroonnissa Khatoon* (1), it has been held that the fact that, under certain circumstances a river is, in some places, and at extreme time of low water, capable of being crossed, does not warrant the presumption that the river was a fordable stream at the time of the formation of the *chur*.

*Nabin
Kishore
v.
Jogesh
Pershad*

In *Nabin Kishore Ray v. Jogesh Pershad Gangooli* (2), the title of the plaintiff depended wholly on the evidence that the channel between Ababil and the *chur* in dispute was fordable within the meaning of Clause 3, Section 4 of Regulation XI of 1825. The only evidence that was relied upon with safety was the report of the Officiating Collector, Mr. Whinfield, dated 26th January 1869. With reference to this report, Markby, J, said :—"That would be the time of the year when the river is at its lowest, and in paragraph 31 he says: 'I passed down the channel called the Gogra about ten days since at about half ebb, and there saw what appeared to be a channel at least a mile broad between Ababil and the disputed *chur*, and I felt sure that a channel of such width could not be fordable; but on afterwards visiting this channel at the extreme ebb of the tide, I found that the water had receded, leaving a great extent of sand dry on both sides, and that it was easily fordable. Several men crossed the channel in my presence at the points marked with dotted red lines. I had a compass and the map with me, and noted this down at the time. Thus, whatever may have been the case four or three years ago, the disputed *chur* is

(1) 3 Suth. W. R. 219 (civ). (2) 14 Suth. W. R. 352 (civ.)

certainly an accretion to Ababil at the present time. Boats, and even large boats, can still pass though the channel at high water, but at ebb tide even small boats stick. My *panswe* drawing $1\frac{1}{2}$ cnbit, stuck quite at the east entrance of the channel at low water, though a couple of hours after I saw a *Dacca pulwar* going over the same ground when the flood tide came."

'The question then really is whether Mr. Whinfield was right in his opinion that a channel in the condition which he describes, that is to say, which can be crossed on foot at the extreme ebb, and probably for some short time before and after, is 'fordable' within the meaning of clause 3, section 4 of Regulation XI of 1825."

"I have given this question a good deal of consideration because of its importance, and because I differ from the construction put upon the word by Mr. Whinfield. Upon the whole, I have come to the conclusion that the Legislature did not intend to give to the riparian proprietor the property in an island formed in a bed of a navigable river, when the channel which intervenes is, under ordinary circumstances, and at the most favorable season, unfordable at least 16 hours out of every 24."

From the cases cited above, it follows that a stream *will not be fordable* within the meaning of Clause III, Section 4, Regulation XI of 1825, if it can be crossed on foot, (i) in a zig-zig way, taking advantage of the higher portions of the bed, (ii) only at the extreme low-tide, (iii) for a short time of the day.

Next, it may be maintained that a channel *will be fordable*, if it can be crossed on foot, (i) on a direct ford from the mainland to the chur, (ii) under ordinary normal tides by a man of average height, (iii) for the most part of the day at any season of the year, (iv) at any points between such island and the shore.

What is not a fordable channel under Reg. XI of 1825.

What constitutes a fordable channel.

Now, the elements as stated just above, which constitute a fordable channel within the meaning of the Regulation have been discussed partly in reference to the rulings cited in the foregoing pages. The conditions set forth above, also correspond with the definition which was provided by the Indian Alluvion Bill of 1881, where the depth of the river was required to be not exceeding five feet, which is the average height of a man up to his breast. Among the conditions, stated above, the following points are to be considered below.

"At any season of the year :—"

Fordable at
any season of
the year
explained.

The provision of law declared by the *second part* of Clause III, Section 4, as it would seem, was enacted in reference to the physical conditions of this country. The difference, or rather the contrast, in the conditions of the rivers of this country between the rainy season, and dry season, is so remarkably impressive, that the physical aspect of one season presents quite a contrast to that of another. That which was full of tumultuous waves, with the banks lost in the horizon in one season, is reduced to a dull and languid stream in another season, with water so shallow as to be capable of being crossed over on foot here and there. So variable being the nature of the volume of water, and tide and current, it can hardly be equitable for the Legislature to enact a law only in view of the state of things prevailing in one season, in complete disregard of the condition in another. That which is unfordable at one season, may quite possibly be fordable at another. The Indian Legislature, therefore, being guided by the physical conditions of the country, thought it fit to lay down a rule in the Regulation which does not appear to have found any place in the legal system of the United Kingdom.

It has also been suggested that this provision was presumably introduced to cut down, so to speak, a

larger right of the Government in islands thrown up in a large navigable river or in the sea. This view was expressed by (L. S.) Jackson, J., in the Full Bench case of *Budroonissa v. Prosunno Coomar* (1), where the learned Judge, with reference to the two parts of Cl. III, Section 4, Reg. XI of 1825, observed: "We may easily suppose that the Legislature had a measure at first in contemplation by which the right of Government was declared, if the channel should be unfordable at the time of formation, but that on it being objected that that would be giving Government a larger right than it would be equitable to give, then, in order to cut down as it were that right which Government was to have on the occurrence of such cases, the words 'at any season of the year' may have been introduced. It seems to me also clear that the words 'at any season of the year' refer to the year in which the formation of the island took place, and not to any future year."

The words "at any season of the year" were inserted to cut down the larger right of Government.

Next, referring to the word "the year" it may be said that the Full Bench decision, in the case of *Budroonissa v. Prosunno Coomar* (4) has made it clear that the year mentioned in the *second part* of Clause III Section 4, means the year in which the formation of the island takes place. This has been expressly laid down, in that case by Jackson, J., in the following passage of his judgment: "It seems to me also clear that the words 'any season of the year' refer to the year in which the formation of the island took place, and not to any future year." This view is also supported by Phear, J., in the same case, as will appear from the following passage of his judgment:—"I think the Legislature really meant to say that the channel, for the purposes of this enactment, should be considered fordable at the time when the island is thrown up, if it were then such as to be in fact fordable at the low water period of the year."

"The year" as explained by decided cases.

At any points "between such island and the shore" :—

Fordable at any points between such island and the shore.

The Regulation says that the island shall be considered an accession to the contiguous tenures or estates, if the channel between such island and the shore be fordable at any season of the year. There is nothing to indicate that the channel is to be fordable at all *points* between the shore and such island, nor does not appear that any thing more was intended by the Legislature than this that an island shall be an accession to the contiguous bank, if the channel be proved to be fordable at any point between the shore and such island. This view is supported by the cases which are discussed below :—

In the case of *Wise v. Amirunnissa Khatoon* (1), it has been held that if a *chur* be surrounded by water fordable *at any point*, the owner of the land to which the *chur* adjoins has *prima facie* title to it under Clause III, Section 4, Regulation XI of 1825. This view was upheld in *Kowar Pareesh Narain Roy v. Watson and Co.*, (2), where Sir Barnes Peacock said :— "We entirely agree with the decision of the learned Judges who decided the case which was referred to in the argument (W. R. Vol. II, p. 34) that if a *chur* be surrounded by water fordable *at any point*, the owner of the land to which the *chur* adjoins has a *prima facie* title to it under clause 3, section 4, Regulation XI of 1825." In the case of *Gulam Ally Chowdhury v. Gopal Lal Tagore* (3), the island at the time of its first appearance was surrounded by an unfordable channel, which subsequently became fordable *at a certain part*, and the fordability did not extend beyond the frontage of the defendant's estate. The plaintiff claimed a share of *chur* when the deep water between the island and the state

(1) 2 *Suth. W. R.* 34 (Civ).

(2) 5 *Suth. W. R.* 283.

(3) 9 *Suth. W. R.* 401.

and the *chur* became shallow and fordable. It was held, upon these facts, that the whole *chur* was an accession to the defendant's land and part of his tenure. This decision also supports the view that the fordability need not be established at all the points of the defendant's frontage. In this connection, it may be mentioned that a paragraph of Clause VI of the Indian Alluvion Bill of 1881 was to the following effect:—"Each particle of the island or land so formed, or the river-bed so abandoned, shall belong to that one of the riparian owners who can show a point on the frontage of his holding nearest to such particle"

Contiguous accessions:—The law of *contiguous accessions*, founded upon the fordability of the stream (the bed of which is not the property of an individual) intervening between the *chur* and mainland, is a peculiarity in this country. It has presumably been enacted having reference to the physical condition of the rivers in this country (see p. 412, *ante*). There does not appear to be any corresponding provision in the laws of England and America. The Tagore Professor for 1889 traces the probable origin of the doctrine to the necessity which arose for the first time, when under the jurisprudence of the feudal system the theory regarding the ownership of the beds of rivers underwent a change, and the beds of all navigable rivers came to be regarded amongst the *iura regalia* of the Crown. He further maintains that this doctrine does not find any place in the Roman system of the law of alluvion (1).

Law of
contiguous
accessions
discussed.

Opinion of
the Tagore
Professor

The suggestion made by the first statement seems to be based upon what Grotius said regarding the state of things under which the question of this nature arose (2). As to the second statement, namely, that

(1) Law of Riparian Rights by Doss, p. 199.

(2) *De Jure Belli et Pacis*, Lib II, Cap. VIII, § 15.

under the Roman law the doctrine of a fordable channel did not exist, it may be said that there does not appear to be any doubt so far as the expression "fordable channel" is concerned. On a reference to the opinion of Grotius which has been discussed before (see pp. 363-364 *ante*), it would be apparent that a rule of law similar to the doctrine of a fordable channel was prevalent in Holland, which he declares to be a good law.

Law of
contiguous
accessions is
not based
upon the
Roman Law
theory of an
increase by
imperceptible
degrees.

The law of *contiguous accessions* as declared by the Regulation should be taken independently of any connection with "an increase by imperceptible degrees." In other words, in cases of *contiguous accessions*, the word *accession* need not be qualified by any phrase, such as "*by imperceptible degrees*." An island in rivers, the bed of which is not owned by private individuals, becomes an accession to a contiguous estate when the intervening stream becomes fordable; and it is immaterial to inquire, if such inquiry is possible, whether such accession was by slow and imperceptible degrees (see p. 100 *ante*.) Again, an island in such cases may be thrown up by any alluvial process, that is, by any process of washing up of sand and earth, and not necessarily by perceptible or imperceptible degrees, (see p. 99 *ante*.) All these apparently show that while using the word *accession* in Clauses I and III, the Legislature never thought that any such great difference would be made because of the word "gradual" having been put before *accession* in Cl. I, as to take away the spirit of "annexing" in that clause by substituting for it "an increase by imperceptible degrees." In both the clauses there was apparent intention to mean land being annexed to an estate. (See pp. 222-223 *ante*.)

"Shore":—The use of this word in Part II, Cl. III, Sec. 4, indicates that the law of contiguous accessions applies to the sea, if an island thrown up in it be connected with the shore by a ford. (See p. 371 *ante*.)

Accessions, gradual and contiguous:—In order to attract the operation of Cl. I and Part II of Cl. III, it is necessary to establish that the accessions in both cases have been gained from the public territory. The reasons for this view applicable to the cases of land gained by *gradual accession*, i e., by accretion (see pp. 219-227), which have been discussed at length under "Exceptions to the General Rule of Alluvion" (see pp. 265-272) would apply to the cases of lands gained as *contiguous accessions*.

"Most contiguous" The expression "*most contiguous*" which seems to be a somewhat vague phrase, has been interpreted in the case of *Gulam Ally Chowdhury v Gopal Lal Tagore* (1). In that case, Phear, J., in delivering the judgment, said as follows:—"We think this somewhat vague phrase is intended to comprise only the estate or estates with which the *chur* comes into contact, so to speak, along the length of the fordable part of the channel. It does not embrace estates which may be on the river-bank opposite some portion of the *chur*, but with an unfordable channel lying immediately between them and the *chur*. The Regulation is silent as to how the *chur* is to be partitioned between the estates in the event of its being an accession to more than one at once."

"Most
contiguous"
explained.

Now, if the whole length of the fordable part of the channel lies in contact with the estate of one person, the expression "*most contiguous*" may be taken to mean that estate in preference to those of others who may have an unfordable channel between their frontages and the *chur*. And if the length of the fordable part of the channel be in contact with the estates of two or more persons, and the length of the fords between their estates and the *chur* be different, then, the phrase "*most contiguous*" may mean the estate which has the

"Most
contiguous"
a vague
phrase

(1) 9 Suth. W. R. 401.

shortest ford. This seems to be the plain meaning, as the significance of the word "most" would appear to indicate. But, if the expression "*most contiguous*" be taken to refer to the shortest length of all the fords connecting the mainland with the *chur*, it will result in a grave hardships upon the neighbouring riparian owners between whose estates and the *chur*, the channel may be fordable. They are deprived of their frontages for ever (as the decision in the above case of *Gulam Ally Chowdhury* has laid down) because of the inequality in the length of the fords. This does not appear to have been intended by the Legislature, as the use of the plural number in the words such as "tenures" or "estates" would indicate. It is, no doubt, conceivable that the length of the fords between such tenures or estates and the *chur* may be equal, but if strict measurements be applied, perhaps ninety-nine cases out of every hundred would not stand the test and so, no such accuracy in measurement could have possibly been intended by the Legislature when questions of physical changes are concerned. It is therefore proper to put a reasonable construction upon the expression "*most contiguous*," and it should not be taken to refer to the superlative degree in the matter of contiguity of the estates, all of which are in contact, so to speak, with the fordable part of the channel. The law being based upon the principle of the fordability of the channel, the length of the connecting fords should be considered as wholly immaterial.

In this view, it may be affirmed that the word "most" in the expression "*most contiguous*" cannot prevent it from being applied to the estates, all of which are in contact with the fordable part of the channel. But it would not be unreasonable to suppose that the Legislature in inserting the above expression might have been thinking what generally happens in nature.

namely, that when an island is thrown up in front of several tenures, and some or one of them, having frontage in contact with the fordable part of the intervening channels, would appear to have points more adjoining to the island than others. This is how the interpretation of the expression "*most contiguous*" is rendered complicated. In consideration of the above difficulties, it would seem reasonable to call it a *vague phrase*, as declared by Phear, J., in the sense that it can not be ascertained what it definitely means.

Contiguous accessions to one of the neighbouring estates :—

In the case of *Golam Ally Chowdhury v. Gopal Lal Tagore* (1), it has been held by the Calcutta High Court that under the 2nd part of Cl. III, Sec. 4, a *chur* thrown up in front of two or more neighbouring estates may be an accession only to one of the several estates by reason of the channel intervening only between such estate and the *chur* having become fordable at the time of its first appearance. It has been further held that, if, on account of the above circumstance, the whole of the *chur* becomes the property of the owner of one of the neighbouring estates, no part of it would afterwards cease to belong to him, merely by reason of the deep water between such *chur* and the other estates becoming shallow and fordable subsequently. The silting up of such channel subsequently can not have the effect of transferring the ownership from one person to another. The same decision further lays down that after the *chur* had, by the occurrence of a fordable channel, become part of one of the neighbouring estates, all further accretions to it, if gained by gradual accession, would also belong to that one estate, even though the result would, in the aggregate, be a prolongation of the *chur* in front of the

Golam Ally
v.
Gopal Lal.

other estates. The last view was followed in the case of *Obhoy Charan Nundee v. Bhuban Mohan Mazumdar* (1).

Persons entitled to contiguous accessions.—

It is quite apparent from the words of the 2nd part of Clause III, Sec. 4, that all persons who are entitled to accretions under Clause I, Sec. 4, are also entitled to contiguous accessions as understood by the Third Clause. (See "Person entitled to Accretions" pp. 239-262 *ante*). In the application of the doctrine of a fordable channel, it does not appear that any distinction is to be made in this respect. The provisions of the Regulation on this point seem to be similar under Clause I and the 2nd part of Cl. III.

Government
as private
zemindar is
entitled to
the benefit of
the 2nd part
of Cl. III

The only point that need be considered under this head, is the right of the Government to take the benefit of the 2nd part of Cl. III, Sec. 4. The Government of the country is to take possession of all islands in large navigable rivers, surrounded by an unfordable channel as sovereign power, under the 1st part of Clause III, Sec. 4, but in that capacity, Government can not claim the benefit of the 2nd part of the same clause. The right of the Government to claim alluvial accretions as a private zemindar has been discussed before (see pp. 240-242 *ante*). It can, now, be affirmed that in that capacity the Government can also claim the benefit of the 2nd part of the Third Clause, Sec. 4. This view can be supported by the following observations made by the Calcutta High Court, in the case of *Mussumat Tabira v. The Government* (2), where the Government claimed the chur-land in front of their purchased property:—"If the island, at the time of its formation, were surrounded with water unfordable at the any time of the year, the Government, as sovereign, would have undoubted right, under Clause 3 of the above law and Act IX of 1847, Section 7, to take

*Mussumat
Tabira v.
Government.*

possession. Government, however, does not come into Court in this capacity or with this allegation. Government is inclined to treat the new formation as an accretion to a Government purchased property, which it is not, and comes into Court as a private zemindar. The law applicable to such a case is the latter part of Clause 3 of Section 4, Regulation XI of 1825. If the stream between the *chur* and the main-land be fordable at any season of the year, it must be considered an accession to the land of the person or persons, whose estate or estates may be most contiguous to it. The Government, therefore, before it can establish its right to any portion of the *chur* lands, must prove that the stream is fordable at some time of the year, and that it was fordable when the alluvium formed." This decision was affirmed on review. [See the *Government v Mussumut Tabua* (1)].

Contiguous Accessions to more than one Estate :—

In some cases, the accession as contemplated by the 2nd part of CL. III, Sec. 4, may be gained to more than one estate at a time. It is further possible to conceive that the accession under the above Clause may be gained to both sides of a river at a time. This state of things naturally raises the question of the apportionment of the island gained in the above way. With regard to the rules of apportionment among the claimants on the same bank, reference should be made to what has been said under "Apportionment of Accretions" to several estates (pp. 279-284 *ante*). As to the division of the island among the riparian owners on both sides of a river, the rules relating to the apportionment of islands in non-tidal and non-navigable streams will be applicable. (See also pp. 117-118 *ante*.)

(1) 7 Suth. W. R. 513.

“Subject to the several provisions specified in the first clause of this section, with respect to increment of land by gradual accession.—”

The word
“provision”
in Part II,
Cl. III should
be read as
“proviso.”

An island gained as a contiguous accession to an estate under the 2nd part of Clause III, Section 4, will be treated as an accretion under Clause I, Section 4 in respect of the rights and liabilities appurtenant thereto. The extent of the interest in such accession will be the same as in the land to which it is annexed. This is clear enough from the words of the Regulation. The word “provisions” in the above clause should be read as “*provisos*” to make it clear that it is not the substantive portion of Clause I that is applicable to the 2nd part of clause III, but it is the *provisos* to the first clause to which the provisos of the 2nd part of clause III have been made subject. [See under “Subject to the provisions in the first clause” in Cl. IV, Sec. 4, *post*].

As to the right of the Government to assess such contiguous accessions with revenue, it may be said that the provisions of Act IX of 1847 as interpreted in the cases of *Wise v. Ameeroon-nessa* (1) and *Wise v. Moulvi Abdul Ali* (2) make it apparent that such accessions are assessable with revenue by the Government. No difference, as a matter of fact was ever made between accretions by alluvion in its strict legal sense, and contiguous accessions as contemplated by the 2nd part of Clause III, Section 4, in the application of Act IX of 1847 or of any other Acts dealing with the assessment of revenue to such cases (see pp. 288-303 *ante*). The observations of Sir Richard Couch, and other Judges constituting the Full Bench in the case of *Budroonissa v. Prosunno Coomar* (3) upon this point also support the above view.

(1) 2 Suth W. R. 34 (Civ.)

(2) 2 Suth W. R. 127.

(3) 14 Suth W. R. 25 (F. B. Rulings.)

The rent law does not appear to make any distinction between increments by alluvion, in its strict legal sense, and contiguous accessions, as laid down by the 2nd part of Clause III Section 4. It is further evident from the words of the Regulation itself, that no such difference is contemplated. The law discussed relating to the assessment of rent under Clause I, Section 4, will thus be applicable to contiguous accessions. (See pp. 304-325 *ante*)

ALLUVION AND DILUVION.

SECTION 4, Clause Fourth.

4. *Fourth.*—In small and shallow rivers, the beds of which, with the *jalkar* right of fishery, may have been heretofore recognized as the property of individuals, any sand-bank, or *char* that may be thrown up, shall, as hitherto, belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section.

Chars, etc, thrown up
in small shallow rivers.

Under this clause it is proposed to discuss the law relating to islands in small and shallow rivers which, as shown hereafter, are taken to mean non-navigable rivers for all practical purposes.

Islands in non-tidal and non-navigable rivers :—

Ownership of
islands in
private rivers
under
Roman Law.

The Roman law, as laid down in the Institutes of Justinian, does not make any distinction between islands formed in navigable and non-navigable rivers. Islands in rivers, according to the Roman law, belong to the riparian owners on the banks (see p. 362 *ante*) The theory of law, thus declared by Justinian, hardly leaves any room for a distinction between navigable and non-navigable rivers, which prevails in England as well as in this country.

Grotius seems to divide rivers into two classes, private and public. By a private river, he means a river which was occupied but was afterwards distributed to a private person. A public river, as Grotius understands it, is a river which has not been so distributed and which, for that reason, continues to belong to the people. An island in a private river is the property of the private person, and an island in a

public river belongs to the people or to him to whom the people has given it. (See *De Jure Belli et Pacis* by Grotius, Lib. II, Cap. VIII § 9).

Colquhoun, a distinguished commentator on the Roman Law, says that if an island rise in a public river and become fixed in the middle of the river, it is common to those who possess the land nearest to the bank on each side of the stream, according to the breadth and length of each frontage. An island rising in private rivers and lakes wholly belongs to the private persons who are owners of these lakes and rivers (1).

Now, having regard to the above provisions of the Roman Law on the subject it can be said that no material assistance can be derived from this law for appreciating the rules laid down by the Regulation, in so far as the discussion on the topic of islands in non-navigable rivers is concerned.

The law on the subject under the French Civil Code, as laid down by Code Napoleon, is as follows :—"Islands and accumulations of mud formed in rivers and streams *not navigable* and not *admitting floats*, belong to the proprietors of the shore on that side where the island is formed, if the island be not formed on one side only, it belongs to the proprietors of the shore on the two sides, divided by an imaginary line drawn through the middle of the river" (2). Thus, under the French Civil Code, a distinct provision has been made for islands in rivers not *admitting floats*, as has been done by the Regulation.

Ownership of islands in non-navigable rivers under the French Code.

The law of England on this subject has been dealt with by Lord Hale under the head of "fresh rivers." His Lordship's view on this point will be apparent from the following passage :—"Fresh rivers of what kind soever, do of common right belong to the owners of the soil

(1) Summary of the Roman Civil Law by Colquhoun, § 982 (Vol. II)

(2) Code Napoleon, by R. S. Richards, Sec. 501.

Ownership of
islands in
non-navigable
rivers under
English Law.

adjacent ; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ* ; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." (1).

In England, it is settled law that when the lands of two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is *prima facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aquæ*. Difficulties may arise in determining the *medium filum*, when islands are thrown up in such streams. In the Scotch case of *Menzies v. Breadalbane* (2), it has been held by the Court of Session in Scotland that when the *alveus* is divided by an island or islands into a main and subsidiary channels, the subsidiary channels being at times dry, but carrying water when the river is in its ordinary state, the *medium filum* of the river is the central line of the *alveus* from bank to bank, and not the centre line of the main stream. But in the English case of *Great Torrington Commons Conservators v. Moore Stevens*, (3) it was held that, assuming that the presumption that moiety of the bed of a river passed under a grant of riparian lands applied to land vested in conservators under a private Act, the *medium filum* ought to be drawn not through an island in the middle of the stream, but through the stream between the island and the plaintiff's land. In the case of *Bickett v. Morris* (4), it has been

(1) Hale "De Jure Mtris," Cap. I.

(2) 3 Wils and Shaw 238: 32 R. R. 103.

(3) (1904) 1 Ch. 347

(4) L. R. 1 Sc. App. 47.

laid down that the soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that, if from any cause the course of the stream should be permanently diverted, the proprietor on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium flum*, in the same way as they were entitled to the adjoining land. (1).

From the above decisions it would seem to follow that in England an island in non-tidal and non-navigable rivers belongs to the riparian owners on both sides, and it is to be divided among them by the application of the principle of *ad medium flum aquæ*.

The law of America on this point has been laid down by Chief Justice Shaw, in the case of *Trustees of Hopkins Academy v. Dickinson* (2), where referring to the decision in *Ingraham v. Wilkinson* (4 Pick. 268), the learned Chief Justice said as follows:—"It recognizes the rule of the Common Law, that the property in the soil of rivers *not navigable*, subject to public easements, belongs to those whose lands border upon them; and from this right of property in the soil in the bed of the river, the Court deduce the right of property in an island which gradually arises above the surface and becomes valuable for use as land. Assuming the thread of the stream as it was immediately before such land made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side, and partly on the other of the thread

Ownership of
islands in
non-navigable
rivers under
American
Law.

(1) Coulson and Forbes, *Law of Waters*, p. 117 (3rd Ed.) · *Wishart v. Wyllie*, 1 Mcq. H. L. 389; *Carter v. Mincott*, 4 Burr. 2162; *Reg. v. Inhabitants of Landulph*, 1 Moo. & R. 393 · 42 R. R. 812; *R. v. Wharton*, 12 Mod 510; *Eddleston v. Crossley* 18 L. T. 15.

(2) 9 Cush. 544 (547-550); Angell on the Law of Watercourses, § 48A.

of the river, it shall be divided by such line,—*i. e.*, that line which was the thread of the river immediately before the rise of the island, and held in severalty by the adjacent proprietors."

It will thus follow that according to the law of America an island in a non-navigable river is the property of those who have land on both sides of the banks, and such island is to be divided among opposite riparian owners by the application of the theory of *medium filum*.

Ownership of islands in non-navigable rivers under the Regulation

Ownership of the bed of non-navigable rivers —

It further follows from the above authorities that in England and America the ownership of an island in a non-tidal and non-navigable river is an incident of the ownership of the bed. If such bed belongs wholly to one person by reason of his being the owner of both banks, the island shall be his property, but if the owners of the opposite banks have property in the moiety of the bed, the island shall belong to them in the same proportion (1). It has also been established by the authorities discussed in the foregoing pages that the beds of all non-tidal and non-navigable rivers are *prima facie* vested in the riparian owners of the opposite banks. This presumption is liable to be rebutted, but if not rebutted, it is the legal presumption [see *Devonshire v. Pattison* (2)].

The doctrine of *medium filum* applicable in this country.

It is, next, proposed to consider how far the above doctrine of *ad medium filum aquæ* is applicable to similar cases in this country. In discussing the topic of "Banks and Water under the Regulation," the point which now arises for consideration has been touched upon very briefly (see pp. 53-54 *ante*).

It cannot be stated as an indisputable proposition that a principle akin to the theory of *ad medium filum aquæ* was unknown in this country before the advent,

(1) *Orr Ewing v. Colquhoun*, 2 A. C. 839, and see pp. 426-427 *ante*.

(2) 20 Q. B. D. 263, 57 L. J. Q. B. 189.

of British rule. On turning to the Chapter on Boundary Disputes under the Hindu Law, it will be seen that provisions were made for an equal division of the land on the boundary of two estates by the King, in the absence of other evidence indicating the limits of such estates (see Mitakshara, Boundary Disputes, Chap. IX — "How to ascertain the boundaries when there are no demarcating marks").

An analogous rule under Hindu Law.

Next, referring to the reported decisions, the earliest case in which the principle of *ad medium filum aquæ*, was applied, was that of *Koonwur Hurree Nath Rai v. Musst Joydoorga Burwain* (1), where, the river Brahmaputra flowed on each side of the chur claimed, and the Sudder Dewany Court divided it among the parties whose estates lay on either side of the river.

Decided cases showing the application of the doctrine of *ad medium filum* in determining the ownership of the bed of non-navigable rivers.

In the case of *Raja Neelanaud Sing v. Raja Teknaram Sing* (2), it has been held that, by the common law of the country, the right to the soil and to the fisheries of a river when flowing within the estates of different proprietors, belongs to the riparian owners *ad medium filum aquæ*, that is, to the middle of the stream.

In *Hunooman Das v. Shima Charan Bhatta* (3), it has been held that the presumption is that the property of the soil of a stream is in the owners of the lands adjoining on each side, *usque ad medium filum aquæ*.

In the case of *Bhageeruthee Debee v. Greesh Chunder Chowdhury* (4), in delivering the judgment, Norman, J., observed — "Now by the common law of this country, the right of the soil of a river when flowing within the estates of different proprietors belongs to the riparian owners, *ad medium filum aquæ*," (*Rajah Nil-madhuk Singh v. Rajah Tekaram Singh*, Sudder Dewany Adawlut's Reports, 9th May 1862). We,

Bhageeruthee v. Greesh Chunder.

(1) (1818) 2. Sud. D. R. 269, by Macgn.

(2) (1862) Sud. D. R. 160.

(3) (1862) 1 Hay's Reports, 426 (427). (4) (1863) 2 Hay's Reports, 541 (547).

therefore, think that justice requires that a rule similar to that of the English and Imperial law should be applied to the present case. In fact a similar principle appears to have been acted upon by the late Sudder Dewany Adawlut, in *Koomar Hurinath Roy v. Musst. Joydoorga Buiman*, 9th September 1818, Vol. 2, Select Reports, page 269."

In the case of *Kalikissen Tagore v. Fidoo Lall Mullick* (1), their Lordships of the Judicial Committee appear to have approved of the application of the principle of the *medium filum* to the cases in this country as will be evident from the following passage:— "It appears that the plaintiff, at all events, has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream *ad medium filum*."

*Khagendra
Narain
v.
Matangum
Debi.*

In the case of *Khagendra Narain Choudhury v. Matangini Debi* (2), the point was directly in controversy between the parties. In that case, each party claimed exclusive title to a watercourse situate between the boundaries of the zemindaries of the two opposite parties. The High Court of Calcutta, in appeal, dismissed the two cross-suits instituted by the zemindars of the two estates, as in the opinion of that Court neither party had proved their case. On appeal to the Privy Council, this decision was reversed. While delivering the judgment, Lord Morris said as follows:—"The Mechpara Zemindars claim the piece of water as the northern boundary of that part of their estate, and included in their estate and known as 'the Codalkati Bahirgacha danga,' while the Chapar Zemindars allege that the piece of water is a portion of their estate and is called the 'Tilkumari sota.' The identity of the place appears to be very clear upon the map made by the amiri who was sent to survey it, and that is the

map which their Lordships now deal with, and which was dealt with by the High Court, and by the Subordinate Judge. Their Lordships arrive at the same conclusion as the High Court with regard to the insufficiency of the proof given either by the zemindars of Mechpara or by the zemindars of Chapar as to the right and title to the exclusive possession of the sota in question. But their Lordships are of opinion that the decrees of the High Court cannot be supported as pronounced by the High Court. They are of opinion that, although neither party has proved a title to an exclusive possession, there can be no doubt that possession belongs to the Zemindars of Mechpara and to the zemindars of Chapar."

"The Government, who have attached the valuable point of the fishery pending this litigation make no claim, and they are really in the position of stakeholders."

"The evidence, in the opinion of their Lordships, is insufficient, as already stated, to establish an exclusive possession by either of the parties. On the other hand, it is equally cogent in their Lordship's opinion to show that there is possession between the two."

"The result that their Lordships arrive at is, that the decrees of the Subordinate Court and of the High Court should be respectively reversed, and each of the parties be declared entitled to an equal moiety of the sota opposite to and adjoining their respective Zamin-daries, and be decreed to be put into possession thereof accordingly."

It is to be observed with reference to the above decision of their Lordships of the Judicial Committee, that the documentary evidence of title, consisting of Thak and Revenue Survey papers, was produced in the case. None of those papers did prove the exclusive title of any of the parties in respect of the "sota"

in question. There was evidence of possession on both sides. The Government did not claim the watercourse in dispute. Under these circumstances, the Privy Council held that each of the two contending parties was entitled to a moiety of it opposite to and adjoining their respective zemindaries. This is, in effect, the application of the doctrine—*ad medium filum aquæ*, which means that the riparian owners on the opposite banks are each entitled to the bed as far as the middle thread of the stream (see pp. 53 and 54 *ante*).

The word
"Sota" ex-
plained.

[The word "*sota*" which is very often used in Bengal in connection with suits to be governed by the Law of Alluvion and Diluvion, has been considered by the High Court in that case as meaning 'an elbow or offset of part of a river or low lying land exposed to the action of a river or its channel' (1)].

See also *The Secretary of State v. Bijoy Chand Mahatap* (2).

"In small and shallow rivers" :—

Small and
shallow rivers
mean non-
navigable
rivers,
whether tidal
or non-tidal.

Now, turning to the Regulation, it will be seen that the rivers referred to in Clause Fourth are "small and shallow rivers," the beds of which with the the *jalkar* right are vested in private owners. It is evident that the word "small" has been used as opposed to the word "large" in the preceding clause. It would seem that the word "shallow" which means 'not deep' has been used as distinguished from a "navigable river," contemplated within the meaning of the Third Clause. A navigable river as understood within the meaning of that clause must necessarily be a deep river, to allow the passage of vessels of all kinds for commercial and other purposes. If it is a petty stream navigable only at certain states of the tide, and then only by small boats, it will not be considered a navigable river (3). It is a matter

(1) I. L. R. 17 Cal. 814 (815).

(2) 22 Cal. W. N. 872.

(3) See p. 32, *ante*.

of common knowledge of physical facts that rivers which are "shallow" in the proper sense of the term can hardly admit the passage of large boats laden with goods and merchandise for the most part of the year. According to the general principles of the different systems of law which have been discussed under "Navigable Rivers" (1), the depth of a river is an essential requisite to determine its navigability. In view of the above, it can be said that to call a river a shallow one would naturally exclude the idea of navigability. In a case (2) governed by the Regulation, it was argued that "not fordable" would be "navigable", from which it would follow that non-fordability of a river was a test of navigability. This argument was not considered unacceptable to reason (3). Thus, it may be maintained that the expression, "shallow river" in Cl. IV, Section 4, means 'non-navigable rivers.'

But, it may be contended, on the other hand, that if the word "shallow" was to have meant non-navigable rivers, nothing could have been easier for the Legislature than to insert the word 'non-navigable' instead of the word "shallow," in Clause IV. Section 4 of the Regulation. In reply, it can be said that the framers of the Regulation were presumably persons trained in the terms of the Common Law of England, who were called upon to enact rules in consideration of the physical conditions of the rivers of this country, where a non-navigable river may be a tidal one (4), and where every river, however small, is capable of being passed by small boats to some extent (5), thought it prudent

(1) See pp. 31-41, *ante*.

(2) *Mohini Mohan v. Khajah Assanoolah*, 17 Suth. W. R. 73 (civ).

(3) See p. 40 *ante*.

(4) *Secretary of State v. Kadirikutti*, 1, L. R. 13 Mad. 369. (p 40 *ante*.) *Kirti Kissen v. Jadoo Lal*, 5. Cal L R 97. *Srimanta Bagdi v. Bhagwan Jalia*, 17 Cal. W. N. 1108.

(5) See pp 39-40, *ante*.

to avoid the use of the words like 'non-tidal' and 'non-navigable' to make the rule more comprehensive.

To attract the operation of the Fourth Clause, a river must be *small* and *shallow*, but it would not matter whether it is reached by the tide, or whether it be capable of being passed by small boats only for a portion of the year (1) It would, therefore, seem reasonable to suppose that the Legislature, in order to avoid the difficulties of the above nature, inserted the word "shallow," which for all practical purposes may be taken to refer to non-navigable rivers

Regulation does not apply when the beds of a navigable river is owned by private individuals and so Cl. IV does not refer to such cases.

Next, it has been stated before (2) that navigable rivers the beds of which are the property of private individuals, do not come under the operation of the provisions of the Regulation at all. This view is supported by the decision of the Calcutta High Court in the case of *Jagadish Chundia v. Chowdhury Zahur-ul-Hug* (3) There is another case, namely, that of *Mirza Syfoollah v. Bhuttun* (4) which should, also, be referred to in this connection. In this case it was held that the land forming the dry bed of a canal between the rivers Bhyrub and Gomanee belonged to the estate in which the canal itself was included. In delivering the judgment, Glover, J., observed:—"The Lower Appellate Court held that, as the plaintiff's estate included the bed of the canal, he was entitled to the disputed land as part of that bed, and that the provisions of Regulation XI of 1825 did not apply." The decision thus arrived at by the Lower Appellate Court was upheld by the High Court, which apparently indicates that the view expressed by the Lower Appellate Court relating to the point that the provisions of the Regulation do not apply to such a case, was accepted by the High Court.

(1) *Chundermani v. Sreenivasa Chowdhurani*, 4 Suth. W. R. 54 (civ)

(2) See pp. 267-268 & 378-379 ante.

(3) 24 Suth. W. R. 317.

(4) 10 Suth. W. R. 68. (civ)

Now, in view of this rule, it may be further contended that navigable rivers, the beds of which are owned by private proprietors, do not fall under the operation of Clause IV, Section 4, consequently, it may be held as established that “small and shallow rivers” in that clause do not at least mean navigable rivers, where the ownership of the river is vested in private proprietors. It, therefore, appears reasonable to hold that “small and shallow rivers” mean non-navigable rivers. See also the *Secretary of State v. Bijoy Chand Mahatap.* (1)

“Beds of which, with the jalkar right of fishery, may have been heretofore recognized as the property of individuals” :—

It has been said above that “small and shallow rivers” in Clause IV, Section 4, mean non-navigable rivers which may be tidal. It has also been discussed before that, in the absence of any evidence to the contrary, the ownership of the bed of non-navigable rivers is *prima facie* vested in the riparian owners on both sides of such rivers (see pp 429-431 *ante*). This is, at any rate, the presumption of law, and may be rebutted by positive evidence. If this view of the law be correct, it, then, becomes difficult to understand the significance of the condition like that indicated by the words—“*may have been heretofore recognized as the property of individuals,*” as *ex hypothesi* such beds are presumed to be private property.

The words “heretofore recognized” seem to refer to the time of the Permanent Settlement of Bengal. At that time, navigable rivers flowing through or between estates settled with private zamindars were recognized as their private property in some cases, and in others, they were left unsettled with any body. In those cases, where such rivers were settled as part of the permanently settled estates, the ownership of the

Significance of the words “heretofore recognized &c.”

Private property in the beds of navigable rivers can be proved by its recognition as such at the Permanent Settlement.

bed became vested in such zemindars with the right of Jalkar (1), and where, such rivers were not so settled, they were treated as public property. In the latter case, the jalkar rights, in some instances, were permanently or temporarily granted to other individuals (2). The result that followed from such engagements made at the perpetual settlement was that large navigable rivers flowing through estates permanently settled, which were not settled with any body at that time, are now presumed to be public property, unless the contrary would be proved (see pp. 373-377 *ante*. under "Ownership of Navigable River Bed.") The jalkar rights in navigable rivers flowing through private estates since the time of the Permanent Settlement are not necessarily considered private property of such zemindars, unless they are proved to have been recognized to be so at that time, such rights of jalkars must be proved as granted to them distinctly as a separate entity at the time of the Permanent Settlement [See the *Collector of Jessore v. Beckwith* (3); *Prasunno Kumar v. Ram Coomar*, (4), *Ahmadi Bagum v. Tarak Nath* (5)]. It, therefore, follows from the above state of things that if an individual claim the bed of a river existing from the time of the Permanent Settlement as his private property, he will have to prove that such ownership (including the jalkar right) was recognized at the time of that Settlement. In other words, the recognition at the time of the Permanent Settlement by the Government, of the bed of such river as being

(1) See, for example, the *Collector of Maldah v. Syed Sudurooddeen*, 1 Suth. W. R. 116; *Srinath Ray v. Dinabandhoo Sen*, I. L. R. 42 Cal. 489; *The Collector of Rungpore v. Ranjadab Sen*, 1864 Suth. W. R. (gap. No). 243; *Chander Jaleah v. Ram Charan*, 15 Suth. W. R. 212.

(2) See, for example, *Forbes v. Meer Mahomed Hossein*, 20 Suth. W. R. 44, *Krishendra Roy v. Maharani Sannamoyee*, 21 Suth. W. R. 27 (CIV).

(3) 5 Suth. W. R. 175.

(4) I. L. R. 4 Cal. 53.

(5) 18 Cal. L. J. 399.

a private property, is a test of the ownership of such bed by individuals. Thus the significance of the words "heretofore recognized" may be taken to be established in cases of large navigable rivers.

Now, the question is whether such view is applicable to the rivers which, according to the interpretation given before (see pp. 432-434 *ante*) are meant to be included in "small and shallow rivers" in Clause IV, Sec. 4. The beds of non-navigable rivers flowing between the permanently settled estates are presumed to be the property of the owners of such estate, in the absence of any evidence to the contrary. It may, therefore, be maintained that to prove private property in such beds, it is not necessary ordinarily to prove any recognition of such ownership having been made at the time of the Permanent Settlement except in a case where the state of things would be contrary to the presumption. Thus the significance of the words "heretofore recognized" applicable to the cases of large navigable rivers, shown before, does not apply ordinarily to non-navigable rivers (taking them to mean, "small and shallow rivers" in Cl. IV, Sec. 4). According to this view the words—"may have been heretofore recognized as the property of individuals" should be read—"are the property of individuals", as opposed to the passage—"the bed of which is not the property of an individual," inserted in Clause Third.

On the contrary, it may be contended that the words "heretofore recognized" are not without any significance of their own. The presumption of ownership of the beds of non-navigable rivers between two estates assigns the bed *prima facie* to the riparian owners of both sides of the banks, so that, if the riparian owner on one side claims the bed exclusively, he will have to rebut the presumption of the doctrine of the *medium filum*, by proving the actual grant of the bed to himself,

The presumption of the ownership of the bed of non-navigable rivers may make it unnecessary to be heretofore recognized at the Permanent Settlement.

Significance of the words "heretofore recognized etc"—discussed

at the time of the Permanent Settlement. There are instances in which the beds of "small and shallow rivers" with the julkar right were granted to the riparian owner on one side of the banks at the time of the Permanent Settlement (1). Next, as said already, (see p. 433 *ante*) "small and shallow rivers" referred to in Clause IV, Sec. 4, may be reached by the tides so as to come within the denominations of tidal rivers, the beds of which are according to the provisions of the law of England, vested in the Crown (see p. 367 *ante*). In such cases of tidal non-navigable rivers, the presumption of ownership, *ad medium filum aquæ* may not apply (2). Again, a person other than the riparian proprietors owning such bed will have to establish his title by grant. These are probably the considerations which might have induced the Legislature to insert the words—"may have been heretofore recognized as the property of individuals," instead of the words—"are the property of individuals."

To the above contention, it may be added further that, by the words "heretofore recognized," the legislators probably intended to lay down a rule with reference to the conditions and local position of things existing at the Permanent Settlement, namely, of some rivers which were "small and shallow" at that time flowing between two estates. According to this contention, Clause IV, Section 4, will have no applications to "small and shallow rivers" proved to have formed after the Permanent Settlement. The reason for this restricted application would seem to follow from the fact that new rivers "small and shallow" can form after that date only in private estates either by the shifting of the course of the old rivers or by otherwise. In such cases

CL. IV, S. 4 refers to the bed existing from the Permanent Settlement and not to the beds formed after that date in the permanently settled estates to which Reg. XI of 1825 does not apply.

(1) See, for example, *Chunder Monce v. Sircemats Chowdhurani*, 4 Suth. W. R. 54. *Prosumno Coomar v. Kishen Choytunno*, 5 Suth. W. R. 286.

(2) *Kali Kissen Tagore v. Jodoo Lal Mullick*, 5 Cal. L. R. 97 (100): *Contra. Srinanta Bagdi v. Bhagwan*, 17 Cal. W. N. 1108.

the beds are the submerged lands of a permanently settled estate to which the Regulation does not apply. [See the cases of *Jagadish Chandra v. Chowdhuri Zahoor-ul-Huq*, and *Mirza Syfoollah v. Bhuttun*, cited at p. 434 ante]. The last decision in the case of *Mirza Syfoollah* (1) requires to be discussed. In that case, the Lower Appellate Court held that, as the plaintiff's estate included the bed of the canal, he was entitled to the disputed land as part of that bed, and that the provisions of Regulation XI of 1825 did not apply. In second appeal, Glover, J, in affirming that decision, said: “It appears to us that, on the facts found by the Judge, his decision was correct, and that, as the bed of the canal belonged to the plaintiff (a fact not contested in the petition of special appeal), the land in dispute, which forms part of that bed, must appertain to his estate, and not to the special appellant.” “Cl. 4, Sec. 4 of the Regulation, shows distinctly that this is the case.” The learned Judge then recites Clause IV, Section 4. In the clause, thus quoted, there appears to be some inaccuracy, namely, that the words—“are recognized” were substituted for the words—“may have been heretofore recognized.” So, the significance of the words “heretofore recognized” was overlooked in that case, or they were construed as referring to the beds which “are recognized” as the private property of individuals (from any time previous to the 26th of May, 1825, i. e., the day on which the Regulation was passed).

An additional argument that can be advanced in support of the restricted application of Clause IV, only to “small and shallow rivers” existing from the Permanent Settlement, will follow from the provisions of Reg. II of 1819, as construed by our courts of justice.

The proviso to Clause IV, as expressed by the last line of that clause, lays down that sand-banks or *chars*

And which is not subject to additional assessment of revenue.

(1) 10 Suth. W. R. 68 (civ).

in small and shallow rivers are assessable with fresh revenue. This raises the question whether any *char* thrown up in the bed of a "small and shallow river" within the limits of a permanently settled estate after the date of the Permanent Settlement, can be a subject of re-assessment. Now, a new bed formed by a small and shallow river in a permanently settled estate is the land of that estate covered with water, and when a *char* is thrown up in such bed either by reformation or by dereliction, it would not come within a *char* formed since the decennial settlement, or be land gained by alluvion or dereliction, as contemplated by clause 2, section 3 of Regulation II of 1819. The construction put upon that clause by their Lordships of the Judicial Committee, in the case of *The Secretary of State for India v. Fahamid-annissa Begum* (1), evidently supports this view. In delivering the judgment of the Privy Council in that case, Lord Herschell said:—"This review of the legislation prior to 1847 makes it, in their Lordships opinion, clear that whilst it was intended to bring under assessment lands not included in a permanent settlement, whether they were waste or gained by alluvion or dereliction, all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment. And ... their Lordships think it equally clear that lands within the limits of settled estates which had become covered with water, and afterwards reformed, were not lands 'gained from the river or sea by alluvion or dereliction' within the meaning of this legislation which is confined to lands so gained 'since the period of the settlement'." Continuing upon the same point, his Lordship further observed:—"Their Lordships can not think that it was intended by such a provision as this to deal with the case of lands in

(1) I. L. R. 17 Cal. 590. (602 and 603).

permanent settlement which had become derelict of the sea or a river. They cannot be said to have been ‘added’ to the estate to which they already belonged. Considering the solemn assurance given by the Government to the owners of the permanently-settled estates that they should not be liable to further assessment in respect thereof, their Lordships find it impossible to hold that it was ever intended by this enactment to subject them to an added assessment in respect of land for which they were already assessed because they had had the misfortune to be practically deprived of it for a time by an incursion of the sea or a river.”

It would seem to follow from this decision that a *chur* thrown up in a new bed formed by a “small and shallow” river in a permanently settled estate after the Permanent Settlement, is not land added to an estate, and thus, not subject to additional assessment. Consequently, it can be maintained that such beds were not meant to be included within the provisions of Clause IV, Section 4. It can, therefore, be concluded that the beds referred to in that clause are the beds of “small and shallow rivers” existing from the time of the Permanent Settlement. Next, such beds could not possibly mean the beds of small and shallow rivers within the limits of permanently settled estates, as by the presumption of law they are private property (see p. 429 *ante*), and being included in lands within permanently settled estates, they are not subject to additional revenue (see the above case of *Fahamidannessa Begum*). Consequently, it may be maintained that such beds are the beds of “small and shallow rivers” flowing between estates; and they were not assessed at all, as being beds covered with water, although their private ownership was recognized with the right of *jalkar* therein; and therefore, the right to assess them with revenue can not be affected by the decision in the above case of

River-beds contemplated by Cl. IV are the beds of rivers flowing between estates and subject to assessment of revenue.

Fahamidancssa Begum, when such rivers are silted up or yield lands within the meaning of Sec. 3, Cl. 2 of Regulation II of 1819. The view thus taken explains the significance of the words—"may have been heretofore recognized as the property of individuals."

As a result of the above discussion it may be affirmed that the river-beds referred to in Clause IV, Section 4, are the beds of "small and shallow rivers" between permanently settled estates, which were recognized as private property of the riparian owners or of persons other than the riparian owners, at the time of the Permanent Settlement, with the jalkar right, that is to say, with the right of the several fishery implying the ownership of the bed. So that, if the river be dried up, the bed or the *char* as the case may be, will belong to such owners subject to the assessment of additional revenue, as being land formed "since the period of the decennial settlement" within the meaning of Section 3, Clause 2 of Regulation II of 1819, as distinguished from the reformed land of an estate (see page 292 *ante*).

"Heretofore
recognized
etc."
construed by
decided
cases: -

as "hitherto
considered";

Turning to the reported cases, it may be premised at the outset that they are not of much help, as the point under notice was not directly raised in them. In those cases, it would appear that the words—"may have been heretofore recognized as the property of individuals" were loosely construed. In the case of *Chunder Monee Chowdhurani v. Sreemuttee Chowdhurani*, (1) there was an order of remand by the High Court, on an appeal by the plaintiff, to the Judge of Dinajpur to determine whether the land in suit was a new accretion to the estate of the plaintiff-appellant, or a portion of the bed of the river as it existed at the time of the Decennial Settlement claimed by the defendant-respondent. The finding arrived at by the

(1) 4 Suth. W. R. 54 (civ.)

Judge was expressed in the following words :—"It is I think, sufficiently clear from the record that the land is a new accretion, and did not exist at the time of the Decennial Settlement and in such case, if the Ahar were a deep river within the meaning of clause 1, section 4, Regulation XI of 1825 separating decisively the land in question from defendant's zemindari, plaintiff's claim to it would be indisputable ; but as the Ahar is, as is well known by the court, a small and shallow stream, not navigable for a considerable period of the year for boats even of the smallest size, the case must be decided by the provisions of clause 4 of the above section." In this case, it was further found that the defendant was the acknowledged proprietor of the bed of the Ahar. The High Court, in appeal, accepted this finding and said thus : "We must adhere to the facts found by the Judge according to which finding the Ahar is a small and shallow river, the bed of which ... has hitherto been considered to be the property of the defendant." In the same judgment, while discussing the provision of Clause IV of Section 4, the learned Judges (Trevor and Campbell, JJ.) observed : "This is opposed to the doctrine laid down in clause 1, section 4 which enacts that, in rivers not small and shallow, and the ownership of individuals in the bed of which has not been recognized, but remains in the public, churs thrown up are an increment to whose estate it is annexed." Now, in this judgment, the words—*"has hitherto been considered to be the property of individuals"* have been employed to mean the condition expressed by the words—"may have been heretofore recognized as the property of individuals," in Clause IV, and the words—*"the bed of which has not been recognized"* have been used to mean a status contrary to the condition denoted by the words—"may have been heretofore recognized as the property of individuals."

as "are
recognized;"

In the case of *Mirza Syfoollah v. Bhutton* (1), the words—"are recognized" have been used to mean the status denoted by the words—"may have been heretofore recognized." (See p. 439 *ante*).

as "was
recognized."

In *Ram Shurn Shaha v. Bhote Kinkur* (2), Phear, J., in delivering the judgment, observed: "In order to avail himself of clause 4, the plaintiff must prove that the land in question was 'the bed of a small and shallow river' which with the julkur of fishery over it, was recognized as the property of the individual through whom he claims." In this case, the words "was recognized as the property of the individual" were used to mean the status indicated by the words—"may have been heretofore recognized as the property of individuals."

It would seem from the cases, cited above, that the words "may have been heretofore recognized as the property of individuals" were construed in those decisions by implication, and the construction, thus made, does not militate against the view that, while enacting that clause, the legislators were thinking of "small and shallow" rivers which have been existing from the time of the Permanent Settlement, as urged in the foregoing pages.

Significance
of the word—
"recognized."

Again, the use of the word "*recognized*" would seem to suggest that such beds were only recognized as private property, and not permanently assessed with revenue, as they were not in a fit condition to be assessed. Mere recognition of the private right may be taken as distinguished from "permanently assessed with revenue," as in the case of new alluvial accretions where private ownership is recognized by the law, but they are not permanently assessed with revenue until they be in a fit condition to be assessed. (See pp. 298-301 *ante*).

(1) 10 Suth. W. R. 68 (civ.)

(2) 14 Suth. W. R. 268.

"With the jalkar right of fishery" :—

The provisions of law declared by Cl. IV, Section 4, require that certain data should be established before that clause can be applied to a particular case. namely, that the river-bed shall be such as may have been heretofore recognized as the property of individuals and that the *jalkar* right or fishery thereto also should be a part of such property. It would seem that it was intended that both the bed and the *jalkar* should have been recognized as private property at the same time, the latter possibly implying the ownership of the former. But in the class of rivers, referred to by clause IV (1), where the bed may have been heretofore recognized as private property, the ownership of the *jalkar* right would follow the property in the bed according to the established rule of law (2). It, therefore, seems rather difficult to understand the significance in such cases of a separate condition like that denoted by the words—"with the *jalkar* right of fishery" (See, "Right of Fishery' Not Significant" in Clause IV, *post*)

Jalkar in the river bed heretofore recognized as private property-discussed.

Now, in order to be able to appreciate the above position correctly, it becomes necessary to discuss the Law of Fishery, particularly in relation to non-navigable rivers. The Law of Fishery has been, in several cases, considered as a subject cognate with the Law of Alluvion and Diluvion 3). Their cognate nature can be established by reference to the fact that the laws in both the cases are connected with *tidality*, *navigability* and the ownership of the *bed* of a river or the sea (4). Arguments at the bar in several *jalkar* cases were advanced upon principles analogous to those of the Law of Alluvion, as laid down in Regulation XI of 1825 (4).

Law of fishery is a cognate subject.

(1) See p. 432 *ante*.

(2) 17 Cal. W. N. 1108 & see p. 429 *ante*.

(3) *Srinath v. Dinabandhu*, I. L. R. 42 Cal. 489.

(4) See pp. 24-26.

In some cases the analogical principle was applied (1), and in others, it was held not applicable (2). In the case of *Srinath Roy v. Dinabandhu Sen* (2), their Lordships of the Judicial Committee, having failed to determine the principle upon which the theory of the *jalkar* right to follow the river was established in Bengal, observed :—"Why the owner of the *jalkar* right in the river has or may have an enjoyment of that right co-extensive with the waters of the river which permanently form part of it, though they have changed their course, is not stated. Not improbably it rested on local custom, for the Bengal Alluvion and Diluvion Regulation (No. XI of 1825) is careful in a cognate matter to keep local custom alive." Thus, in the opinion of their Lordships, the law of fishery may be determined in some cases by local custom as provided by the rules declared by the Regulation. It is not necessary to dwell much upon the cognate nature of the law of fishery with that of the Regulation, as the point arises from the express use of the expression '*jalkar* right' in the provisions declared by Cl. IV. Sec. 4.

According to Lord Hale fishery in fresh rivers is an incident of the ownership of the bed which is vested in riparian owners.

Next, referring to the Roman and French Civil laws it may be said that no material help can be derived from these sources, so far as the law of fishery relating to non-navigable rivers is concerned. So, it becomes necessary to start with the law of England under that head. The law of England is laid down by Lord Hale in the following words :—"Fresh rivers of what kind so ever do of common right belong to the owners of the soil adjacent ; so that the owners of the one side have of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*, and the

(1) *Maharanees Sibessury Debce v. Lakhy Debce*, 1 Suth. W. R. 88 (civ)

(2) *Srinath v. Dinabandhu*, I. L. R. 42 Cal. 489 : 20 Cal. L. J. 385 : 18 Cal. W. N. 1217.

owners of the other side, the right of soil or ownership and fishing unto the *fium aquæ* on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience."

' But special usage may alter that common presumption ; for one man may have the river, and others the soil adjacent ; or one man may have the river and soil thereof, and another the free or several fishing in that river." (1).

Consistently with the above view, it appears to be settled law in England that in all rivers and streams above the flow and re-flow of the tide, whether such rivers are navigable or not, the proprietors of the land abutting on such stream are *prima facie* owners of the soil of the *alveus* or channel *ad medium fium aquæ*, and as such, have *prima facie* the right of fishing in front of their land. [See *Bickett v. Morris* (2), *Wishart v. Wyllie* (3), *Mayor of Carlisle v. Graham* (4), *Lamb v. Newbiggen* (5), and the case of Lord *Fitzwalter* decided by Lord Hale, C. J. (6)]. In the case of *Murphy v. Ryan* (7), O' Hagan, J., in delivering the judgment, said : " According to the well-established principles of the common law, the proprietors on either side of the river are presumed to be possessed of the bed and soil of it moiety to a supposed line in the middle, constituting their legal boundary, and being so possessed, have an exclusive right to the fishery in the water which flows above their respective territories."

In the case of *Foster v. Wright* '8), the plaintiff was the lord of a manor within which the Lune a non-

Decided cases in which the above view was applied to non-tidal navigable or non-navigable rivers.

(1) Hale "*De Jure Maris*" Cap I.

(3) 1 Macq. II. L. 389.

(5) 1 Car. & K. 549.

(7) 11 R. 2 C. L. 143.

(2) L. R. 1 Sc. App. 47.

(4) L. R. 4 Ex. 361.

(6) 1 Mod. 106.

(8) 4 C. P. D. 438.

tidal and non-navigable river was situated. Certain lands of the manor, not abutting on the river were enfranchised in favour of the defendants. After the enfranchisement, the manor became forfeited to the Crown, but it was re-granted with free liberty of fishing in all its waters to the predecessors of the plaintiff. Since the re-grant of the manor the river by slow and imperceptible degrees wore away its banks and eventually encroached upon the lands of the defendant, which could be indentified as having been part of the defendant's property. The defendant having fished in this portion, the plaintiff brought a suit for trespass. The Court held that the defendant was liable on the ground that the gradual encroachment by the river had the effect of annexing the soil of the defendant to the land of the plaintiff and of excluding him from exercising his right of fishery over it.

Owner's right
of fishery in
private
streams is
territorial
fishery.

The right of fishery in private streams, in England, whether navigable or non-navigable, is a right of property, one of the profits of the land, and has been called a *territorial fishery*. It is not, strictly speaking, a riparian right arising from the right of access to the water, but it is a profit of the land over which the water flows. In the case of *Lyon v. Fishmonger's Co.*, (1) when dealing with the foundation of riparian rights, Lord Selborne said thus : "With respect to the ownership of the bed of the river, this cannot be the foundation of riparian rights properly so called, because the word 'riparian' is relative to the banks and not to the bed of the stream ; and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law."

The right of fishery in non-tidal rivers as stated above, is an incident of the ownership of the bed. Such right can therefore be granted or transferred to a

different person to be enjoyed by him as an incorporeal hereditament. Thus, the exclusive right of fishery which a stranger acquires either by grant from the owner of the soil or by prescription in non-tidal rivers is called a *several fishery*. (See Hale quoted at p. 447 *ante*.)

Exclusive right of fishery in the private stream of another is a *several fishery*

Next, the term 'exclusive fishery' in non-tidal rivers means a *several fishery* as well as a *territorial fishery*. A question, therefore, arises whether the ownership of a *several fishery* in non-tidal rivers imports the ownership of the soil. This point appears to have been much controverted in England. On this point Lord Coke thus expresses himself: "If a man be seized of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seizin *secundum formam chartæ*, the soil doth not pass, nor the water, for the grantor may take water there; and if the river become drye, he may take the benefit of the soil, for there passed to the grantee but a particular right, and the livery being made *secundum, formam chartæ* cannot enlarge the grant. For the same reason if a man grant *aquam suam* the soile shall not pass, but the pischary within the water passeth therewith" (1).

Whether the grant of a *several fishery* passes the soil.

In the case of *Holford v. Bailey* (2), Lord Denman, C. J., delivering the judgment of the Court, said: "No doubt the allegation of a several fishery, *prima facie*, imports ownership of the soil, though they are not necessarily united." In the same case, on appeal (3) Parke, B., in delivering the judgment of the Exchequer Chamber, said: "A several fishery, is no doubt, *prima facie* to be assumed to be in the soil of the defendant." In the case of *Marshall v. Ulleswater Co.* (4), this

Such a grant raises a presumption of the ownership of the soil.

Marshall v. Ulleswater Co.

(1) Co Litt. 4(h) Coulson and Forbes, Law of Waters, p 414 (3rd Ed.)

(2) 8 Q. B. 1000 (1016) · Coulson and Forbes, Law of Waters, p. 414.

(3) 13 Q. B. 426 (444).

(4) 1 B & S. 732 : Coulson and Forbes, Law of Waters, p 414.

question again arose, and Wightman and Mellor, JJ., constituting the majority of the Court, held that a grant of a *several* fishery, together with livery of seisin, reserving a quit rent to the then lord of the manor, must, in the absence of evidence to the contrary, be taken to convey a corporeal and not an incorporeal inheritance, as a feoffment with livery of seisin and the reservation of a quit rent are not appropriate to an incorporeal estate, and that, therefore, the soil passed by the grant. Cockburn, C. J., though holding himself bound by the case of *Holford v. Bailey*, was of a different opinion. After citing the opinion of Lord Coke, to the effect that a grant of a *several* fishery does not pass the soil, he proceeds : (1) "Now, independently of the high authority of Lord Coke on such a matter, I must say that this doctrine appears to me the only one which is reconcileable with principle or reason. It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why then should such a fishery be considered as carrying with it, in the absence of negative proof, the property in the soil ? On the contrary, it seems to me that there is every reason for holding the opposite way. The use of the water for the purposes of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter ; on a grant of the land, the water and the incidental and accessory right of fishery, would necessarily pass with it. If, then, the intention be to convey the soil, why not convey the land at once, leaving the accessory to follow ? Why grant the accessory that the principal may pass incidentally ? Surely such a proceeding would be at once illogical and unlawfulerlike."

Bloomfield
v.
Johnson.

In the case of *Bloomfield v. Johnson* (2), where the

(1) 3 B. & S. at p. 747.

(2) Ir. R. S. C. L. 68 : Coulson and Forbes, Law of Waters, p. 415

Irish Court of Exchequer Chamber held, that 'the grant of a *free* fishery in Lough Erne did not pass the soil, Fitzgerald, B., in his learned and elaborate judgment, after citing with approval the opinion of Coke above-mentioned, says "I am aware of no case prior to that of *Marshall v. Ulleswater Navigation Co.*, in which anything really inconsistent with the position of Lord Coke can be said to have been decided. It may be questioned, whether for the decision of that case it was necessary to dispute Lord Coke's position, but undoubtedly the Judges who made that decision, especially Cockburn, C. J., who was dissatisfied with it, but held himself bound by former authorities, do appear to lay it down as law, that the grant of a fishery, by the owner of the soil in the water of that soil, would, if accompanied by livery of seisin, pass the soil. But *Holford v. Bailey*, and that class of cases which, for this purpose, decide only that the allegation in pleading or otherwise of the ownership of a *several* fishery generally does, *prima facie*, imply the ownership of the soil, are the only authorities referred to, and this—I say it with deference,—appears to me quite consistent with Coke's position."

From the authorities, cited above, it would seem to follow that in England when a *several fishery* is accompanied by livery of seisin, there is a *prima facie* presumption of the ownership of the soil in favour of the grantee of such fishery, which, if not rebutted, proves the ownership of the soil.

If not rebutted
proves the
ownership
of the soil.

In the case of *Attorney-General v. Emerson* (1), the House of Lords have approved the decisions, cited above, and held that a right of *several fishery* on the sea-shore exercised by the lord of an adjoining manor by means of fixed "kiddles" raises the presumption that the freehold of the soil is in him. See the

(1) (1891) A. C. 649

observations of Lord Herschell, who delivered the judgment of the House in that case. See also *Hanbury v. Jenkins* (1), where it has been laid down that a *several* fishery may exist either apart from or as incident to the ownership of the soil over which the river flows, but where a *several* fishery is proved to exist, the owner of the fishery is to be presumed, in the absence of evidence to the contrary, to be the owner of the soil, whether it is a navigable river or a river neither public nor navigable.

Free fishery
in private
rivers.

A *free fishery*, i.e., a right of fishing not exclusive—may also exist in private waters by grant or prescription from the owner of the soil. "If he who is the owner of the soil, and as such entitled to the exclusive right of fishing, grant to another the right of fishing so as not to exclude himself, the grantee has a right of fishing not exclusive, but without the soil, and the owner of the soil retains the soil with a right of fishing no longer exclusive. The right of the grantee will be properly called—as all, I think, admit—a common of fishery. The right of the grantor is apparently something more; he has the ownership of the soil, the right of fishing incident thereto being no longer exclusive, but abridged by his grant; as against any one but his grantee, his rights are, what they were before. If free fishery be the common name for this right of fishery in both cases, then, as applied to the grantee, it may be called synonymous with common fishery; as applied to the grantor, it will be something more." *Per Fitzgerald, B.*, in *Bloomfield v. Johnson* (2).

The ownership of a *free fishery* does not import the ownership of the soil, and a grant of free fishery by the owner of the soil has been held not to pass the soil *ad medium filum aquæ* (3).

(1) (1901) 2 Ch. 401.

(2) Ir. R. 8 C L. 68 (107).

(3) Coulson and Forbes, Law of Waters, p. 416.

As to the right of the owner of fishery in non-tidal rivers to follow the shifting course of the channel, it may be said, that in England, such right will depend upon the nature of the process by which the change is effected. If such river encroaches upon the neighbouring land gradually and imperceptibly, the right of fishery will continue in the channel upon the land thus encroached ; but if the encroachment upon the neighbouring land be the result of a sudden and perceptible change of the course of such river, the right of fishery can not be exercised in the new channel. This point has been discussed in *Foster v. Wright*, (1) cited already (at p. 447 *ante*). In that case, Lindley, J., delivering the judgment of the Court, said : 'The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property ? I am of opinion that it does. The change of the bed of the river has been gradual ; and although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. Under these circumstances, I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner. Gradual accretions of land from water belong to the owner of the land gradually added to : *Rex v. Yarborough* (2) ; and conversely, land gradually encroached upon by water ceases to belong to the former owner : *In re Hull and Selby Rail. Co.* (3)."

Fishery right to follow the change of the course in cases of non-tidal rivers.

"Upon such question as this" continued Lindley, J., in another part "I am wholly unable to see any difference

(1) 4 C. P. D. 438.

(2) 3 B. & C. 91 : 5 Bing. 163 : 27 R. R. 292.

(3) 5 M. & W. 327.

between tidal and non-tidal, or navigable or non-navigable rivers ; and Lord Hale himself says, there is no difference in this respect between the sea and its arms and other waters : *De Jure Maris*, p 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on more general reasons to which I have alluded above. In *Ford v. Lacy* (1), the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion, and I do not regard that case as throwing any real light on the question I am considering."

Right of fishery in non-tidal rivers can not be acquired by the public by prescription, or custom.

It has been said before that the right of fishery in non-tidal rivers can be acquired by a stranger either by a grant or prescription. Next, a question arises, whether such right can be acquired by the public by prescription or by immemorial user. It seems to be the settled law of England that such right cannot be acquired by the public in non-tidal rivers. The principle upon which this view rests is that the right of fishery is connected with the ownership of the soil, so where the ownership is in the Sovereign as trustee for the public, the right of fishery can be acquired by the public ; but, where the ownership of the soil is *prima facie* in private individuals, as in non-tidal rivers, no such right can be acquired by the public.

Murphy v. Ryan.

In the Irish Court of Common Pleas (2), a question arose as to the right of fishing in the river Barrow which was proved to be in the place in question, a non-tidal navigable river which had been navigated from time immemorial, and in which there had been an immemorial usage of fishing by the public. The

(1) 7 II. & N. 151.

(2) *Murphy v. Ryan*, Ir. R. 2 C. L 143 : Coulson and Forbes, Law of Waters, pp. 392 & 393.

Court held that as the right of the public to fish in the sea and its arms and estuaries, and in tidal waters, depends on the ownership of the soil by the sovereign as trustee for the public, such a right could not be claimed by the public in non-tidal waters, where the soil belongs, *prima facie*, to the riparian owners *usque ad medium filum aquæ* and not to the Crown; and that moreover, such a right could not be established by immemorial user being a claim to a *profit à prendre* in the soil of another, which might involve the destruction of his property.

In the cases of *Pearce v. Scotcher* (1) and *Smith v. Andrews* (2), the Courts have fully adopted the law laid down in *Murphy v. Ryan*, discussed above, and held that there can be no public right of fishery in non-tidal waters, even where an immemorial usage has been proved. So it has been held in *Reece v. Miller* (3) (cited at pp. 24 & 25 *ante*) that in that part of a navigable river where the water was not salt and in ordinary tides unaffected by any tidal influence, though upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide, no public right of fishing could exist.

In the case of *Mayor of Carlisle v. Graham* (4), the English Court of Exchequer held, following *Murphy v. Ryan*, that as the public right of fishing in public navigable rivers arose from the ownership of the Crown of the bed of such rivers, where a public navigable river changed its bed and flowed over a channel in the soil of a subject, the public right of fishing was lost

(1) 9 Q. B. D. 162

(2) (1891) 2 Ch 678.

(3) 8 Q. B. D. 625.

(4) L. R. 4. Ex. 361 : see also Coulson and Forbes, *Law of Waters*, pp. 392 and 393.

The decisions, cited above, uniformly uphold the view that no right can be acquired by prescription or custom by the public in a case which is unreasonable and which might involve the destruction of the property.

In America, where the doctrine of the Common Law is generally applied to determine the fishery right in rivers, the law of fishery in non-tidal rivers seems to be the same as in England. In a case (1), Shaw, C. J. remarked: "It is now perfectly well established as the law of this Commonwealth, that in all waters not navigable in the Common-Law sense of the term, that is, in all waters above the flow of the tide, the right of fishery is in the owner of the soil upon which it is carried on, and in such rivers that the right of soil is in the owner of the land bounding upon it. If the same person owns the land on both sides, the property in the soil is wholly in him, subject to certain duties to the public; if different persons own the land on opposite sides, each is proprietor of the soil under the water, to the middle or thread of the river. This is recognized in many cases as the common right of riparian proprietors, subject, in Massachusetts, to regulation for the common benefit, by the legislature."

"The rule, that the right of fishery, within his territorial limits, belongs exclusively to the riparian owner, extends alike to great and to small streams. Thus, the owners of the farms adjoining Connecticut River, above the flowing of the tide, have the exclusive right of fishery, opposite their farms, to the middle of the river; though the public have an easement in the river, as a high way, passing and re-passing with every kind of water-craft" (2).

(1) *Mc Farlin v Essex Co.*, 10 Cush. 309: and Angell, *Law of Watercourses*, § 64.

(2) *Ibid.* § 65.

With regard to the rule relating to the *several fishery*, the law in America seems to be the same as in England. So it has been said that though there is no reason why a person may not have a several fishery *in alieno solo*, yet *prima facie*, he is owner of the soil, and that presumption is conclusive, if not opposed (1).

Now, turning to the law of this country, it will be seen that a rule of law similar to that of England was laid down by the Sudder Dewany of Calcutta, in the case of *Raja Neelanund Singh v. Raja Tek Nisain Singh* (2), where three learned Judges [Trevor, Loch, and Bayley Esqrs.] referring to the plaintiff's claim to the julkur in a river flowing through the estate of the defendants, observed. 'It will be observed that the plaintiff's allegation is one altogether contrary to the common law of the country, by that law the right to the soil of the river and that to the fisheries, when flowing within the estates of different proprietors, belongs to the riparian owners *ad medium filum aquæ*, that is, to the middle of the stream, and if the river flows within the estate of one and the same proprietor, the soil and the fisheries of the river belong to him throughout the river's course within the estate, but no further.'

In this country the ownership of the julkur in non-navigable rivers is presumed to be in the riparian owners.

Decided cases on the point.

In the case of *Hunooman Das v. Shama Churn Bhatti* (3), it has been laid down that the presumption is that the property of the soil of a stream is in the owner of the land adjoining on each side, *usque ad medium filum aquæ*. [See also the cases under "Ownership of the Bed of Non-navigable Rivers" pp. 428-429 *ante*].

In the case of *Forbes v. Meer Mahomed Hossein* (4), the plaintiff who was the auction-purchaser of a zemini-

Forbes v. Meer Mahomed

(1) Angell, Law of Watercourse, p. 77, foot-notes.

(2) (1862) Cal. Sud. D. R. 160 (162). (3) 1 Hay's Reports, 426.

(4) 12 Beng. L. R. 210, 20 Sudh. W. R. 44 (Civ.)

dari brought a suit against a dependent Talukdar (Istemraree) who had been in possession of the julkurs in a river, portions of the course of which lay partly in his own estate, and partly in the lands of the plaintiff and defendants. In that case, while delivering the judgment of the Privy Council, Sir James Colville, referring to the distinction between the different classes of julkurs in dispute, observed: "The distinction between the the different classes of julkurs in dispute has already been noticed, and it may be admitted that, although the respondents would presumably have the right of fishing in waters lying wholly within the limits of their dependent *talook*, they would not presumably have the exclusive right of fishing in the waters dividing their lands from those of the appellant, or any right of fishing in places wherein the property in the soil is wholly in the appellant."

Srimanta Bagdi
v.
Bhagwan Jalia.

In the case of *Srimanta Bagdi v. Bhagwan Jalia* (3), where the point in controversy between the parties related to the right of fishery in a river which was found to be a tidal non-navigable river. While deciding in favour of the proprietor of the estate through which the river flowed, Richardson and Newbould, JJ., observed; "In Bengal the right of Government in these large rivers depends to some extent in the wording of Regulation XI of 1825, and similar reasoning leads us to suppose that the rights of fishery in small rivers such as the river now in question which are tidal but not navigable belong to the proprietor's through whose estate they run."

In England the presumption applies to non-tidal rivers, navigable or non-navigable, whereas in this country

In this country, as already discussed (see pp. 26-30 *ante*), the navigability or non navigability of the river determines the presumption of the ownership of the fishery and the fact of being reached by the tide does not affect the right of fishery as in England, where the rule

of the presumption of the ownership of the bed and of the fishery in favour of the riparian proprietors applies in cases of non-tidal rivers, irrespective of the fact whether such rivers are navigable or non-navigable (See pp. 447-448 *ante*). Thus, it will be apparent that the application of the rule of English Law to the julkur cases in this country is limited to rivers which are *non-navigable*. The law of this country being founded upon a custom derived from the physical conditions of the rivers, a rule somewhat different from the rule of England, which is based upon the common law test of *tidality*, has been adopted.

that rule applies only to non-navigable rivers tidal or non tidal.

It has been said before (see pp. 449 & 457 *ante*) that under the English and American laws a *several* fishery in non-tidal rivers, *prima facie*, imports the ownership of the soil. Now the question is, whether such presumption of ownership applies to a fishery of the similar kind in non-navigable rivers in this country. Before dealing with this question, it seems proper to discuss whether the right of a *several* fishery in non-navigable rivers in this country can be a subject of grant and prescription as in England (see p. 449).

Whether a *several* fishery in this country imports the ownership of the soil.

It would follow from the decisions, cited above, that the fishery in non-navigable rivers, in this country, is, *prima facie*, an incident of the ownership of the bed of the river, and, therefore, belongs exclusively to the person who is the owner of the estate through which it flows (see pp. 457-458 *ante*). As such owner he can enjoy it himself exclusively and grant it exclusively to a different person. In the former case, it is called a *territorial* fishery, and in the latter case it is a *several* fishery. The legality of such grants in this country has been discussed, in the cases of *Bissen Lal Das v Ranee Khyrunnissa Begum* (1), *Forbes v. Meer Mahomed Hossein* (2) and *Radha Mohun Mundul v. Neel Madhub*

Territorial fishery.

Several fishery.

By grant

(1) 1 Suth. W. R. 78 civ. (2) 12 Beng. L. R. 210. 20 Suth. W. R. 44 civ

Mundul (1). In *Forbes'* case, their Lordships of the Judicial Committee observed :—"And that *julkur* or the right of fishing may exist in India as an incorporeal hereditament and a right to be exercised upon the land of another is shown by the case of *Lutchee Dasse v. Khatima Bibi*, reported in the second volume of the Sudder Dewanny Adawlat Reports, at page 51. In that case A had purchased at a public sale by the Collector the *julkur* of certain *jheels*. One of them became dry, and it was determined that A's purchase of the *julkur* only did not convey any property in the lands which belonged to the proprietor of the *jheel*. But the *julkur* was held, so long as the land was covered with water, to exist as a separate right, and a right belonging to the purchaser." In this case, it may be noted that the point arose in connection with the fishery in a river, but the decision referred to by their Lordships in support of their view, related to a case of *julkur* in a *jheel*. So, it is apparent that, in the opinion of their Lordships, the same rule relating to the grant of fishery would apply whether it be a river or a *jheel*.

In *Radha Mohun's* case, Jackson, J., observed "It is quite familiar that *julkur* rights are frequently granted extending over large estates—the property of other persons than the grantees of the *julkur*." For instances of such grants, see also *Suroop Chunder v. Fardine, Skinner & Co.* (2), *Munohur Chowdhry v. Nursingh Chowdhry* (3).

By
prescription.

Whether
fishery *in
gross* is an
easement in
this country.

As to the point whether the right of fishery in non-navigable rivers can be acquired by prescription, that is, by twenty years' user as provided by Sec. 26 of the Indian Limitation Act (IX of 1908), it may be affirmed broadly that having regard to Sec. 2, Cl. (5) of that Act, it would not now seem to be a matter of doubt that fishery *in gross* comes under the definition of

(1) 24 Suth. W. R. 200. (2) Marsh, 334 (3) 11 Suth. W. R. 272.

easement, as laid down by that clause. This view was held by the Calcutta High Court, in the case of *Chundee Churn Roy v Shib Chunder Mundul* (1). In that case, it has been laid down that the word "easement," as used in the Limitation Act of 1877, has, by force of the interpretation-clause (S 3), a very much more extensive meaning than the word bears in the English law, for it includes any right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing, or attached to, or subsisting upon the land of another. An easement, therefore, under the Indian Law, embraces what is called a *profit à prendre*, that is to say, a right to enjoy a profit out of the land of another. A prescriptive right of fishery is an easement as defined by Sec. 3 of the Act, and may be claimed by any one who can prove a user of it for a period of twenty years, although he does not allege and can not prove, that he is, or was, in the possession, enjoyment, or occupation of any dominant tenement.

*Chundee
Churn
v.
Shib Chunder.*

The above view was affirmed in the case of *Lutchmeeput Singh v. Sadaulla Nushyo* (2), where (R. C.) Mitter, J., in delivering the judgment, observed: 'The next question is, whether the defendants have established a prescriptive right to this fishery right. The learned pleader for the respondents upon this point has relied upon S. 26 of the present Limitation Act. That section requires that any easement which is claimed (a right of fishery has been held now to be an easement under the present Limitation Act)—see *Chundee Churn Roy v. Shib Chunder Mundul* (I. L. R. 5 Cal. 945 · 6 C L. R. 269) must be shown to have been peaceably and openly enjoyed by any person claiming title thereto & &c.'

*Lutchmeeput
Singh
v.
Sadaulla.*

(1) I. L. R. 5 Cal. 945 : 6 Cal. L. R. 269.

(2) I. L. R. 9 Cal. 698 : 12 Cal. L. R. 382.

In the case of *Dukhi Mullah v. Halway* (1), it has been held by the Calcutta High Court (*per* Macpherson and Banerjee, JJ.) that the term "easement" includes *profits à prendre* and that it has not been used by the Indian Legislature in the restricted sense, in which it is used in English law so as to exclude *profits à prendre*. Hence, the right of fishery comes within the easements referred to in section 147 of the Criminal Procedure Code (Act X of 1882). This view was followed in *Kali Kissen Tagore v. Anund Chunder Roy* (2).

Lokenath
v.
Jahania Bibi.

The view laid down in the above case of *Chundee Churn Roy* was followed in *Lokenath Bidyadhar v. Jahania Bibi* (3), where Mookerjee, J., in delivering the judgment, observed : "The plaintiffs do not set up a prescriptive right of fishery under section 26 of the Limitation Act of 1877. No doubt under that statute, a profit *à prendre* such as a right of fishing in another's waters falls within the description of an easement. *Chundee v. Shib*. If the plaintiffs had claimed any statutory right of easement, it would have been necessary for them to prove that the right had been exercised within two years before the commencement of the suit."

Ahmadi
Begum
v.
Taraknath.

In the case of *Ahmadi Begum v. Tarak Nath Ghose* (4), where the plaintiff claimed the right of territorial fishery in certain lakes or *bheels* to which the defendants set up a right of fishery by grant. In delivering his judgment in that case, Mookerjee, J., observed : "The defendants do not claim any title to the soil covered by the waters in which they set up a right to fish. They claim fishery rights under a grant from the Crown ; if they establish this grant, the suit must be dismissed on the merits. If the defendants fail to establish the grant and rely upon possession, they must

(1) I. L. R. 23 Cal. 55.

(2) I. L. R. 23 Cal. 557.

(3) 14 Cal. L. J. 572 (574.)

(4) 18 Cal. L. J. 399 (444).

show that they have acquired a statutory right of easement, because, as pointed out in *Chundi Churn v. Shib* (I. L. R. 5 Cal. 945 : 6 Cal. L. R. 269) and *Lokenath v. Jahania* (24 Cal. L. J. 572), a profit *a prendre*, such as a right of fishing in another's waters is an easement within the meaning of that term as defined in section 3 of the Indian Limitation Act, 1877, though it is worthy of note that the case of *Abhoy Churn v. Dwarka Nath* (I. L. R. 39 Cal. 53) raises the question whether an exclusive right of fishery in a tidal and navigable river can be acquired by proof of mere enjoyment in the manner provided by the statute without a grant from the Crown."

Consistently with the view taken above, the right of fishery detached from the land has been held to be *not land* under the Land Acquisition Act I of 1894, in the case of *Raja Shyam Chunder v. The Secretary of State* (1). In that case, the Government having acquired the foreshore of the sea under the Land Acquisition Act leased the fishery right therein to certain persons for a term of years and they transferred or sublet their rights to others. Government subsequently took proceedings under the Land Acquisition Act to re-acquire the fishery rights. It was held that these incorporeal rights detached from the land out of which they arose, were not subjects for acquisition under the Land Acquisition Act, as fishery rights were not land within the meaning of that Act.

Fishery rights are not land under Act I of 1894. (Land Acquisition Act).

The Bengal cases, cited above, evidently establish that according to the definition of "easement" under Act XV of 1877, and Act IX of 1908, (Indian Limitation Act) the right of fishery in another's land is an easement and as such that right can be acquired by twenty year's user as contemplated by section 26 of the Indian Limitation Act. It is further apparent from the

(1) 7 Cal. L. J. 445 : 12 Cal. W. N. 569.

above decision in *Dukhi Mullah's* case that in this country the word "easement" has been used in a more comprehensive sense than that the word bears under the English Law. (See p. 462 *ante*).

In Bombay
and Madras
and other
provinces.

The definition of the term *easement* laid down by the Indian Limitation Act has been repealed in the Provinces to which the Indian Easements Act (V of 1882) has been extended. That Act now applies to the Presidencies of Bombay and Madras as well as to the territories administered by the Lieutenant-Governor of the North-Western Provinces and the Chief Commissioner of the Central Provinces, Oudh, and Coorg. By Sec. 3 of the Indian Easements Act, Secs. 26 and 27 of the Indian Limitation Act, 1877, and the definition of "easement" contained in that Act have been repealed in those territories. An "easement" as defined by Sec. 4 of Act V of 1882 includes easements proper and profits *a prendre* which are appurtenant to land and it would seem that fishery *in gross* is not intended to be covered by that definition. The right of fishery upon another's land in those provinces may, therefore, be regarded only as immovable property, and, in this view, it is capable of being acquired by adverse possession for over twelve years. This view may be supported by the decisions cited below.

Several fishery
acquired by
adverse
possession.

Bombay
cases.

*Baban
Mayacha v.
Nagu
Shravacha.*

In the case of *Baban Mayacha v. Nagu Shravacha* (1), Sir Michael Westropp, while dealing with the point whether the right of the public to fish in the sea is an immovable property, observes that fisheries which are regarded as immovable property under the provisions of the several Indian Acts are private fisheries, as distinguished from the public right of fishery in the sea.

*Bhundal
Panda v.
Pandol.*

Following the above view, it has been held by the Bombay High Court, in the case of *Bhundal Panda v.*

(1) I. L. R. 2 Bom. 19 (52 & 53).

Pandol Pos Patil (1), that the exclusive right of fishing in the Nagothna creek between high and low water mark claimed by the plaintiff, in that case, come under the denomination of immovable property under Section 9 of the Specific Relief Act (1 of 1877).

In *Ponnusawmi Tevar v. The Collector of Madura* (2), it was held by the Madras High Court (*Per* Scotland, C. J., & Innes, J.) that the grant of an easement (e. g. the right to an uninterrupted flow of water through a channel) may be presumed from mere continuous user of the privilege openly enjoyed by the occupiers of the dominant tenement as of right throughout any long period of time, without interruption on the part of the proprietor of the servient tenement, but with this qualification that the user should be for at least the period of adverse possession which is prescribed by Section 1, Clause 12 of the Act of Limitation as a bar to the enforcing of title to corporeal property. (This case was decided in 1869).

Madras cases.
Ponnusawmi
v.
Collector of
Madura.

In *Zamindar of Kurupam v. Zamindar of Merangi* (3), the right to divert the flow of water into a particular channel by erecting a dam across a stream was established by proof of the exercise of the right for 18 years prior to 1871 in a suit brought in 1878, as the easement was an interest in immovable property, entitling the plaintiff to institute the suit within 12 years from 1871. Following the principle of the decision in the above Bombay case of *Bhundal Panda* it has been held by the Madras High Court, in the case of *Krishna v. Akilanda* (4), that a right of ferry is immovable property or the interest therein within the meaning of Section 9 of the Specific Relief Act (1 of 1877).

Zamindar of
Kurupam
v.
Zamindar of
Merangi.

In *Innasi Pillai v. Sivagnana Desikar* (5), it was

Innasi Pillai
v.
Sivagnana.

(1) I. L. R. 12 Bom. 221.

(2) 5 Mad H. C. R. 6.

(3) I. L. R. 5 Mad. 253.

(4) I. L. R. 13 Mad. 54.

(5) (1895) 5 Mad. L. J. 95.

held that the right to collect rent from tenants was immovable property within the meaning of section 9 of the Specific Relief Act (1 of 1877). In that case, Muttusami Aiyar, J., in delivering the judgment, said: "I am inclined to agree in the observations of the minority of the learned Judges who decided the case of *Fadu Jhala v. Gour Mohun Jhala*, I. L. R. 19 Cal. 544. In *Bhundal Panda v. Pandul Pos Patil*, I. L. R. 12 Bom. 221, the right to fish was recognised as being within the definition of the General Clauses Act. The right to work a ferry and the right to fish are not distinguishable from the right to collect rent in so far as they are all within the purview of the definition of immovable property in the General Clauses Act." This decision was affirmed in Letters Patent Appeal No. 44 of 1894. See also the case of *Jagannatha Chatter v. Rama Royer* (1).

Bengal cases.

A similar view was held by the Calcutta High Court, previous to the passing of the Indian Limitation Act of 1877, as would be apparent from the following cases :—

*Parbutty
Nath v.
Maddho Paroe*

In the case of *Parbutty Nath Roy v. Mudho Paroe* (2), the plaintiff claimed the the julkur in a certain water where the defendant had been exercising a right of fishing adversely to the plaintiffs for 18 years. It was held that the suit by the plaintiff for a declaration that he was entitled to the exclusive right of fishing in such water was barred by limitation and that the julkur was not an easement within the meaning of section 27 of Act IX of 1871 but was an interest in immovable property within the meaning of Schedule II, Art. 145 of that Act.

*Lukhimoni
v.
Karuna Kant.*

In *Lukhimoni Dasi v. Karuna Kant Moitra* (3), it was held (*per* Jackson and Tottenham, JJ.) that when

(1) I. L. R. 28 Mad. 238.

(2) I. L. R. 3 Cal. 276 : 1 Cal. I. R. 592.

(3) 3 Cal. L. R. 509.

a person had exercised the right of fishing in a tank adversely for twelve years, his right to fish become absolute and indefeasible.

In the case of *Maharani Suino Moyee v. Degumbary Debi* (1), the right of fishery was treated as immovable property, and two year's limitation was not applied. (L. S.) Jackson, J., in delivering the judgment in that case, said - "The plaintiff's case was that she was the owner of the Julkur rights appertaining to pergunnah Bahribund and that some of the estates over which that right extended fell within the defendant's estate, pergunnah Bheturbund and that she had been accustomed to exercise such julkur rights and to derive profits therefrom, but that by reason of certain acts of the defendants done without her consent, the condition and nature of her julkur, that is the sheets of water over which these rights extended had been materially changed, in so much as to affect the profits derived by her from the julkur..." "The Munsiff dealt with the case as if brought in respect of an easement. That it clearly was not because the julkur right was just as much the property of the plaintiff as the land in pergunnah Bheturbund was the property of the defendants."

Suino moyee
v.
Degumbary.

The above cases were decided before the passing of the Limitation Act of 1877, when the Limitation Act of 1871 was in force. Under Act IX of 1871, the right of fishery was treated as immovable property, and in that view, the right could have been acquired by adverse possession for over twelve years. Even after the passing of the Limitation Act of 1877, the fishery right has been held to be immovable property, in cases where such right is claimed as appurtenant to an estate, as will be evident from the Full Bench decision in the case of *Fadu Jhala v. Gour Mohan Jhala* (2). In that case,

The right of
fishery
appurtenant
to land is
immovable
property.

Fadu Jhala
v.
Gour Mohan
Jhala

(1) Vol. II, Shome's Law Reporter. 93.

(2) I. L. R. 19 Cal. 544.

it has been held by the majority of the Judges constituting the Full Bench that, although the fishery right comes within the denomination of immovable property, it is not so within the meaning of section 9 of the Specific Relief Act of 1877, and a suit for the possession of a right to fish in a *kāñāl*, the soil of which does not belong to the plaintiff, does not come within the provisions of section 9 of the Specific Relief Act.

Ram Gopal
v.
Nurumuddin.

In the case of *Ram Gopal Bysack v. Nurumuddin* (1), it was held that a *julkur* was immovable property within the meaning of section 106 of the Transfer of Property Act (IV of 1882). Norris and Macpherson, JJ., in that case, said. "We are of opinion that the *julkur* right is immovable property within the definition of immovable property as set out in the General Clauses Act, that it is a benefit to arise out of land covered by water, and this conclusion we think is justified by the expression of opinion of at least three of the learned Judges who were parties to the Full Bench decision of *Fadu Jhala v. Gour Mohun Jhala* (I. L. R. 19 Cal. 544.)"

Lokenath
v.
Jahania Bibi.

In *Lokenath Bidyadhar v. Jahania Bibi* (2), the plaintiffs claimed the right to a fishery within the ambit of the defendant's estate of Bara Benakula as annexed to their estate of Gopinathpur. This was supported by the revenue-settlement of 1815, which showed that the fishery in question was treated as annexed to Gopinathpur. Courts below allowed the claim. In second appeal, it was argued on behalf of the defendant-appellant that the suit not having been brought within 6 years from the date of dispossession the claim was barred, as it was not a suit for possession of immovable property. In overruling this contention, Mookerjee, J., said "In our opinion, there is no room for reasonable doubt that a

(1) I. L. R. 20 Cal. 446.

(2) 14 Cal. L. J. 572 (577).

right of this description relates to an interest in immovable property. In support of this proposition, reference may be made to the decision of their Lordships of the Judicial Committee in *Maharana Futteh Sangji v. Dessai Kuhlairaiji* (1). The interest of the plaintiff possesses the qualities both of immobility and of indefinite duration and also issues out of immovable property ; it is consequently an interest in 'immovable property.' But for the right acquired by the plaintiffs, the defendant, as proprietor of his land, would have been entitled exclusively to exercise a right of fishery over his land when flooded by water from the lake ; that right has legally vested in the plaintiffs, and has become annexed to the proprietorship of the estate owned by the latter. To this extent, therefore, the rights incident to the ownership of the estate of the defendant have been abridged ; to that very extent, the plaintiffs, have acquired an interest in the immovable property of the defendant. The view we take, is supported by the cases of *Mohunt Deo Surun v. Ismail* (24 Suth. W. R. 300) and *Parbatty Nath v. Mudho Paroe* (I. L. R. 3 Cal. 276) : see also *Radha Mohun v. Neel Madhub* (24 Suth. W. R. 200), *Mahananda v. Mangala* (I. L. R. 31 Cal. 937 : 8 Cal. W. N. 804), *Kurupam v. Merangi* (I. L. R. 5 Mad. 253), *Amrita Nath v. Mati Lal* (4. Cen. P. L. R. 16). It follows that the suit may rightly be treated as a suit for possession of an interest in immovable property within the meaning of Art. 144, and is, therefore, not barred by limitation, except in so far as the defendants have been in adverse possession for more than twelve years." See also the observations of Mookerjee, J., in the same case, quoted at p. 462 (*ante*.)

Next, it may be considered whether a prescriptive right of fishery in private waters can be acquired by the public at large or by an indefinite and unlimited

(1) (1873) L. R. 1. I. A. 34 (53) : 21 Suth. W. R. 178.

Whether a prescriptive right to a several fishery can be acquired by the public or any unlimited number of persons.

Lutchmeeput
v.
Sadaulla.

number of persons. (See pp. 454-455 *ante*). This point was raised in the case of *Lutchmeeput Singh v. Sadaulla Nushyo* (1). In that case, the plaintiff brought a suit to restrain the defendants from fishing in certain *bhils* situate within the zemindari of which the plaintiff was the Putnidar. The defendants contended that they had been in possession of the *bhils* for more than 12 years and that they had a prescriptive right in common with the inhabitants of the zemindari to fish therein, according to the custom. Courts below dismissed the suit. In second appeal to the High Court, the decisions of the lower Courts were reversed. While discussing the *prescriptive right* claimed by the defendants under section 26 of the Limitation Act, (R. C.) Mitter, J., said : "The section evidently requires that the same person or persons must be shown to have exercised that right for a particular length of time. Then, again, from the length of user (a fact found by the lower Courts in favour of the defendants), it can be presumed that there was a grant by the Sovereign Power. It seems to us that the presumption of a grant is impossible : because in this case it cannot be shown that there was some ascertained grantee or grantees. The Subordinate Judge was of opinion that the tenants of the several *pergunnahs*, in whose favour the right in question is claimed, must be considered to constitute a unit,—that is to say, he considers that they form a corporate body. We fail to see any tangible ground for this assumption. For instance, it may be that such a grant may be presumed in favour of a village community, if such community be shown to possess all the essentials of a corporate body ; but we do not see any reason suggested by any evidence on the record which can support the conclusion that the tenants of the different *pergunnahs*, in whose favour the right

(1) I. L. R. 9 Cal. 698 · 12 Cal. L. R. 382

in question is claimed, form anything like a corporate body," In overruling the contention on the basis of *custom*, the learned Judge stated thus: "According to the custom set up, there is no limitation to the number of persons entitled to enjoy it. The tenantry may increase to any number, so that according to this custom, an unlimited number of persons can take away the profits of a private property, and that nothing may be left to the owner. If the defendants are entitled to exercise the right of fishery in the way stated by them, they may take away the whole of the fish stocked in the *bhils*, leaving nothing for the plaintiff, who is admittedly the owner of them. Such a custom as this does not seem to be reasonable. We are, therefore, of opinion that it ought to be rejected as invalid."

This decision was followed in *Wali Ahmed Chowdhury v. Tota Meah* (1), where it was held that acts at different times by a fluctuating body of persons did not amount to adverse possession. See also *The Secretary of State v. Mathurabhai* (2).

Now, reverting to the point (see p. 459 *ante*) whether the grant of a *several* fishery in private waters, in this country, *prima facie* raises a presumption of the ownership of the soil, it may be affirmed that the current of decisions in this country has laid it down, that such a grant does not import the ownership of the soil. In the case of *Suroop Chunder Mazumdar v. Jardine, Skinner & Co.*, (3) it was held by the Calcutta High Court that the right of fishery was an incorporeal right and did not imply any right of property or interest in the ground covered by the water. This view was held following the old decision, in the case of *Lukhee Dasi v. Khatima Bibi* (4), where the Court of Sudder Dewany ruled that the purchase of a julkur, at a public

In this country a *several* fishery does not import ownership of the soil.

(1) I. L. R. 31 Cal. 397 (404.) (2) I. L. R. 14 Bom. 213 (220-221).
(3) (1864) 1 Marsh. 334. See p. 115 *ante*. (4) 2 Macn. Sud. D. R. 51.

sale by the Collector did not convey any property in the lands. In *Bissen Lal Das v. Ranee Khyrunnissa* (1), it has been held that where a julkur dries up, the dried land below the water does not, as a matter of course, become the the right of the holder of the julkur.

A similar point arose in the case of *Munohur Chowdhury v. Nurshing Chowdhury* (2) where, in delivering the judgment, Glover, J., observed : "We may remark that it has been decided more than once by this Court that a julkur settlement does not necessarily include the land on which the water rests ; and it is for the party holding that julkur settlement to prove that he is entitled not only to the right of fishery, but also to any land which the drying up of the water may lay bare." In the case of *Radha Mohun Mundul v. Neel Madhub Mundul* (3), Jackson, J., in delivering the judgment, observed: "Upon the general question of right to the soil under-lying the *baels* and other julkurs, there is no very distinct authority ; but it appears to us, as a general question of law, that the right to a julkur by no means involves a right to the soil when the julkur is either dried or filled up by accumulation of soil." Following the decision in the last case of *Radha Mohun Mundul*, it has been held in *David v. Grish Chunder Guha* (4) that, in this country a julkur does not necessarily imply any right in the soil. (See also p. 174 ante). [See the dictum of Sir Richard Garth to the contrary, in *Rakkhal Churn Mundul v. Watson*, I. L. R. 10 Cal. 50].

In the case of *Mahananda Chakravarti v. Mongala Keotani* (5), after referring to the cases, cited above, Geidt and Mookerjee, JJ., observed : "Where the grant is merely of a right of fishery, the lessee acquires no

Unless it be
a matter of
express grant.

(1) 1 Suth. W. R. 79.

(2) 11 Suth. W. R. 272.

(3) 24 Suth. W. R. 200. (4) I. L. R. 9 Cal. 183 : 11 Cal. L. R. 305.

(5) I. L. R. 31 Cal. 937 : 8 Cal. W. N. 804.

interest in the subsoil and is not entitled to retain possession when the water dries up" But, in this case, looking to the terms of the lease and specially to the condition that the lessee was to continue liable for the rent even in case of drought and non-rearing of the fish, it was held that the lease intended to pass the whole of the interest of the grantor.

It would, therefore, seem that in this country the question whether the grant of a *several* fishery conveys the soil would be determined upon the construction of the grant without raising any presumption in favour of such grantee.

Next, as to the term *territorial fishery* in non-navigable rivers, it may be added that it has been already defined, with reference to the cases in non-tidal rivers decided in Great Britain and Ireland (see pp. 448 *ante*). In India, also, a *territorial fishery* (see p. 459 *ante*) in non-navigable rivers is understood as an incident of the ownership of the bed. Decisions relating to the point have been cited with reference to the topic of the "Ownership of the Bed of Non-navigable Rivers" at pp. 428-430 (*ante*). See also pp. 457-458 *ante*.

Territorial fishery in non-navigable rivers.

It now remains to consider the effect of the shifting of the course of the non-navigable river flowing between two estates.

It has been stated before that, when a non-navigable river flows between the boundaries of two estates, opposite riparian owners are entitled to fish in it *ad medium filum aquæ*, in the absence of any evidence to the contrary. The principle that is applicable to the cases of this nature is analogous to the rule applicable to the fishery in *beels* or lakes on the boundary of two estates, which has been discussed before (see pp. 114-117 *ante*). In connection with the fishery in such *beels*, *jhils* or lakes, reference may, also, be made, to the cases of *Mohiny Mohan Das v. Krishna Kishore*

Territorial fishery in waters on the boundary of two estates, how far affected by the change in the course of such river.

*Gobind
Chunder
v.
Khaja Abdul
Ganni.*

Dutt (1) *Nobocumar Das v. Govinda Chunder Roy* (2), and *Raja Barodacant Roy v. Baboo Chunder Coomari Roy* (3). Now the question arises, how far the right will be affected by a change in the course of such a river. This point was raised in the case of *Gobind Chunder Shaha v. Khaja Abdul Ganni* (4) decided by the Calcutta High Court. In that case, it appears that the defendant and the plaintiff and others were joint proprietors of the julkur of a river. They afterwards divided the property under a *butwarah*, but the julkur remained entire. The river changed its course subsequently and a portion of it came over the land which formerly belonged to the parties jointly, but was allotted to the plaintiff under the *butwarah* and one of the proprietors defendants fished in that portion. The plaintiffs thereupon instituted a suit for trespass. Under these circumstances, it was held (*per* Peacock, C. J. and L. S. Jackson, J.) that a co-proprietor could not be sued for trespass for fishing in a julkur in which he and the other proprietors were entitled to fish merely because the julkur, by a change in the course of the river, ran over the land which was allotted to the plaintiff under a *butwarah*. This case was referred to approvingly by the Judicial Committee in *Srinath Roy v. Dinabandhu Sen* (I. L. R., 42 Cal. 489).

*Narendra
v.
Nripendra.*

In the case of *Narendra Chandra Lahiri v. Nripendra Chandra Lahiri* (5), the facts were as follows:— Each of the two plaintiffs owned eight annas share in mouzah Thansingpore, and two annas share in a contiguous mouzah Muktipore. The defendants had no interest in Thansingpore, but they owned a twelve-anna share in the other village Muktipore. At the time of the Thakbast operations, the river Ghaghat flowed

(1) I. L. R. 9 Cal. 802. (2) 9 Cal. L. R. 305.

(3) 12 Moo. I. A. 145; 2 Beng. L. R. I. (P. C.); 11 Suth W. R. I. (P. C.).

(4) 6 Suth. W. R. 41 (Civ). (5) 4 Cal. L. J. 51; 10 Cal. W. N. 540

through Muktipore, and it was surveyed as part of that property. The two plaintiffs, as part owners of Muktipore owned the julkur right in the river Ghaghat to the extent of four annas share. Subsequently the river gradually encroached upon Thansingpore and partly flowed through it. The plaintiffs instituted the suit claiming to exercise the julkur right over that portion of the river which covered Thansingpore to the extent of their proprietary interest in that property, that is to say, eight annas each. The defendants contended upon the authority of the case of *Foster v. Wright* (1) (see pp. 447-448 *ante*) that the river having gradually encroached upon Thansingpore by slow and imperceptible process, they as owners of the old bed of the river were entitled to exercise the julkur right in the new river to the same extent as they did when it flowed entirely through Muktipore, notwithstanding that it then covered a part of Thansingpore. In overruling this contention of the defendants, Ghose, J., said : "Following then the principle which underlies the case of *Lopez v. Muddun Mohun Thakoor* (13 Moo. I. A. 467), it seems to be clear enough that the portion of the site of Thansingpore which is now covered with the water of the river Ghaghat still belongs to the owners of that property, notwithstanding the fact that by gradual and imperceptible encroachment the river has submerged that portion of Thansingpore ; and if this is so, it is difficult to see how the owner of Muktipore, can have acquired the right of fishery in that portion of the river which now covers Thansingpore. There is no law that we are aware of under which such a right could be asserted."

In the opinion of the learned Judges (Ghose and Pargiter, JJ.) the case of *Foster v. Wright*, was distinguishable inasmuch as the right of fishery in that case

(1) (1878) 4 C. P. D. 438.

was a right *in alieno solo*, depending not on the ownership of the bed, but on express grants from the Crown, irrespective of the ownership of the soil over which the water flowed.

It has been further held in that case that in this country, such cases are to be decided on principles of equity and justice.

If may be also observed that the principle laid down in the case of *Foster*, cited above, was held inapplicable to a Bengal case by the Privy Council : see *Srinath Roy v. Dinabandhu* (1).

How far the words "with the jalkar right of fishery" are significant. See p. 445. *ante*.

Now, the brief discussion of the law relating to the fishery in non-navigable rivers set forth in the forgoing pages establishes the connection of the fishery-right with the ownership of the bed and discloses the fact that at the time of the Revenue Settlement the fishery in the small and shallow river of some estates was settled as appurtenant to other estates. [For example, see *Maharanees Surmo-Moyee v. Degumbary Dabee* (2 *Lokenath Bidhyadhar v. Fuhania Bibee*, pp. 468-469 (3). *ante*.] A question, therefore, now arises for consideration whether the settlement of that description removes the difficulty of explaining the significance of the insertion of the additional condition indicated by the words—"with the jalkar right of fishery" in the 4th Clause, Section 4, (See p. 445 *ante*). The right of fishery in non-navigable rivers is presumed to be an incident of the ownership of the bed, (see pp. 428-429 *ante*), and such presumption may be rebutted by proving an actual grant in favour of another land-owner as appurtenant to his estate, that is to say, according to the settlement made at the time of the assessment of revenue the bed of such a river may be the part of the estate to which it adjoins, but the julkur right therein may be a part of another estate.

(1) I. L. R. 42 Cal. 489.

(2) Vol. II. Shome's Report. 93. (3) 14 Cal. L. J. 572.

Small and shallow rivers of this nature, in other words, a bed heretofore recognized as a private property *without the jalkar right of fishery* would not attract the operation of the 4th Cl., Sec. 4, if the words—"with the jalkar right of fishery" are supposed to possess any significance of their own. This would seem to follow from the plain meaning of the condition indicated by the words—"the beds of which *with the jalkar right of fishery*, may have been heretofore recognized as the property of individuals."

But, referring to the existing law, it will be obvious that the apparent significance of the words—"with the jalkar right of fishery," as suggested above, is not maintainable. Let the position be examined with reference to the cases where the right of fishery in such a river is vested in the owner of a different estate, and the ownership of the bed of such a river continues in the person who may have been recognized as the proprietor of it. In such a case, if the river dries up, the dried up bed will be the property not of the owner of the fishery, but of the person who is the proprietor of the bed, (see pp. 159-160 *ante*). Nor can the owner of the fishery claim any right to fish in *beels* or *dobas* left in such bed (see pp. 118-120 *ante*). Again, if the jalkar be filled up by the accumulation of soil, the owner of the the jalkar can not lay a claim to it (see p. 472 *ante*, *Radhu Mohun's* case). Thus it may be held to be established that the owner of the jalkar in a non-navigable river, when he is a person other than the recognized proprietor of the bed, has no right to the soil of the bed, nor, in such a case, the right of fishery will be any element for determining the ownership of the sand bank or chur thrown up in such bed. If the fishery right be considered an element for determining the ownership of a sand-bank or chur in such bed, it will then be a case, where the bed belongs to the recognized

proprietor as supposed above, but the land upon it (e.g. the *chur*) will be the property of the owner of the fishery therein, which is contrary to the principles of law discussed in the foregoing pages. It may, therefore, be affirmed that the words—"with the jalkar right of fishery" inserted in the 4th Cl., Sec. 4, do not appear to have much practical significance of their own, so far as the ownership of the *chur* or islands in such rivers is concerned.

*Chunder
Monee v.
Sreemati.*

This view can be supported by the decision of the Calcutta High Court, in the case of *Chunder Monee Chowdhurani v. Sreemati Chowdhurani* (1), where it has been held that the mere fact of the julkur right of fishery being in another party does not take a case out of Clause IV, Section 4, Regulation XI of 1825. In a part of the judgment, Trevor & Campbell, JJ., said thus:—"We must adhere to the facts found by the Judge, according to which finding the Ahar is a small and shallow river, the bed of which, without julkur right of fishery, has hitherto been considered to be property of the defendant. Now we have no hesitation in saying that the mere fact of the julkur right of fishery being in another party by no means takes the case out of clause 4 of section 4 of Regulation XI of 1825. The normal state of things, doubtless, is that the julkur should follow the bed of the river. It appears, however, in Dinagepur, that an exceptional state of things exists, but this does not interfere with the essential portion of the section, which is that, in small and shallow rivers, the beds of which are private property, churs thrown up belong to the proprietor of the bed of the river." See also the observations of Jackson, J., in the case of *Dataram Nath v. Eshan Chunder* (2).

Thus, in the opinion of the learned Judges who decided the above case, the *essential portion* of Clause

(1) 4 *Suth. W. R.* 54 (Civ). (2) 11 *Suth. W. R.* 116 (117) Civ.

IV, Section 4 of Regulation XI of 1825 is the ownership of the bed which may have been heretofore recognized as the property of individuals.

An attempt to account for the insertion of the words—"with the jalkar right of fishery" in Cl. IV, Sec. 4, at this distance of time is not a very feasible task. One of the materials which the framers of the Regulation had before them as said before (see pp. 173-174 *ante*), was the opinion given by the Hindu law-officers of the Sudder Court. In the opinion given by them, the following passage occurs :—"In alluvial lands unconnected with one of the banks the right is with those who are entitled to the julkur." (See p. 174 *ante*). The view of Hindu Law thus stated by the law-officers of the Sudder Court, who referred to the texts of Vrihaspati in support of their opinion, but did not quote them, might have induced the Legislature to think that according to Hindu Law the right of julkur determines the ownership of alluvial land unconnected with the banks. To this, it may be added that the framers of the Regulation, who were presumably persons trained in English law, possibly had in their mind the presumption of the ownership of the soil connected with the grant of a *several fishery* under the law of England (see pp. 449-451 *ante*), which led them to suppose that the right of fishery was an essential condition to determine the ownership of the sand-bank or chur in small and shallow rivers.

Probable reasons for the insertion of the words "with the jalkar right of fishery,"

It may be observed that in this country also the right of fishery in non-navigable rivers has been considered in some cases to be the best means of proving the possession and ownership of the bed, as has been held in the case of *Mohiny Mohun Das v. Krishna Kishore Dutt* (1), but *ex hypothesi* the bed is to be presumed as heretofore recognized as property

(1) I. L. R. 9 Cal. 802 : 12 Cal. L. R. 337.

of a particular individual, so the evidence of the fishery right to prove the ownership of the bed is superfluous. Thus, the right of julkur, in such a case, can not be regarded as an *essential* element in determining the ownership of any sand-bank or chur.

"Jalkar right of fishery" should be read as "jalkar or right of fishery."

As to the expression "the jalkar right of fishery" inserted in Clause IV, Section 4. Regulation XI of 1825, it may be further observed that "or" should be read after the word "jalkar," otherwise the word "jalkar" would appear to be superfluous (1).

"Any sand-bank or char that may be thrown up shall ... belong to the proprietor of the bed of the river":—

Sand-banks or churs in non-navigable rivers.

Sand-bank :—While speaking of the increment by alluvion it has been said that the accretion by alluvion should be such as is fit for cultivation or other useful purposes. Merely a sand-bank or strip of land which remains under water for one part of the year and is left dry in another part, is not an accretion within the meaning of the Regulation. (See p. 103 *ante*). Under Cl. IV, Sec. 4, no such distinction is to be made, as appears from the express use of the word "sand-bank" in that clause.

Reported cases.

Next, referring to the cases dealing with the rule declared by Cl. IV, Sec. 4, it may be observed that there are few reported cases on this point and they are briefly noticed below :—

The provisions of Clause IV, Section 4, which are applicable to small and shallow rivers, have been applied to a canal connecting two rivers. In the case of *Mirza Syfoollah v. Bhuttun* (2), it has been held that, according to the provision of Clause IV, Sec. 4, the land forming the dry bed of a canal belonged to the estate in which the canal itself was included. In the case of *Dataram*

(1) Markby, Lectures on Indian Law, 53 (note).

(2) 10 Suth. W. R. 68 (Civ).

Nath v. Eshan Chunder Law (1), Cl. IV, Sec. 4, was applied and it was held that land which accreted to an estate from the bed of an adjoining khal not being a canal but a river, belonged by law to the owner of the estate.

In *Ram Shurn Shaha v. Bhote Kinkur* (2) it has been held by the Calcutta High Court (*per* Phear & Jackson, JJ.) that before clause IV, Section 4, Regulation XI, can have the effect of depriving a party of the title given by Cl. I, Sec. 4, the opposite party must prove that the land in question was the bed of a small and shallow river which, with the julkur right of fishing over it, was recognized as the property of such opposite party.

See also *Ramjun Ali v. Maharam Ali* (3) decided by the Calcutta High Court

Distinction
between
Clauses I and
IV of Sec. 4.

Distinction between Clauses I & IV :—The data which Clause 4 requires to be established before it can be applied to a particular case has been discussed before, (see p. 445 *ante*). The only thing that now remains for consideration is the nature of the principle that distinguishes Clause 4, from Clause 1. In the First Clause, the ownership of the accretion is determined by the ownership of the riparian bank, whereas in the Fourth Clause, such title is determined by the ownership of the bed. While dealing with this distinction, in the case of *Chunder Monee Chowdhurani v. Sreemuttee Chowdhurani* (4), the Calcutta High Court has held that the rule laid down by Cl. IV, Sec. 4, is opposed to the doctrine laid down in Cl. I, Sec. 4, which enacts that in rivers not small and shallow, and the ownership of individuals in the beds of which has not been recognized, but remains in the public, churs thrown up are an increment to the tenure of the riparian owner to whose

(1) 11 Suth. W. R. 116.

(3) 26 Ind. Cases 406.

(2) 14 Suth. W. R. 268.

(4) 4 Suth. W. R. 54 (Civ.).

land or estate it is annexed. In one case, the ownership of the bed of the river carries the right to the accretion with it ; in the other, riparian ownership does the same

Alluvion in Non-Navigable Rivers .—Clause 4, Section 4 lays down that, in small and shallow rivers, which are considered here as coming under the head of non-navigable rivers for all practical purposes, (see pp. 432-435 *ante*) if sand-banks or churs, are thrown up, or any increments are annexed to the bank, they belong to the owner of the bed. In fact, it is obvious that in such cases the ownership of the bed carries the right of ownership to the accretion to it as pointed out in the above case of *Chunder Monee Chowdhrani* (1). It has also been pointed out in that case that there is some distinction between the ownership of the banks of the public navigable river and of the banks of a non-navigable river, when the ownership of the banks and bed is not vested in the same person. In navigable rivers, where the bed is owned by the public, the right to all alluvial accretions to the bank follows the ownership of the bank, and in this view, the law of accretions is regarded as a riparian right. But, in the case of a non-navigable river, where the bed is owned by private individuals (see pp. 428-432 *ante*) the right to alluvial accretions follows the ownership of the bed, and therefore, in such cases, the law of accretions will not be, strictly speaking, a riparian right (2). But, in those cases, where the ownership of the bed follows the ownership of the bank in non-navigable rivers, according to the doctrine of *ad medium filum aquæ*, the right of accretion may be considered a riparian right (see pp. 53-54 *ante*). But this would, however, be a far-fetched consideration. Consequently, it can be maintained that, strictly speaking, the law of accretions as understood within the meaning of Cl. I, Sec. 4, does not obtain in

(1) 4 Suth. W. R. 54 (Civ).

(2) See p. 448 *ante*, *per* Lord Selborne.

non navigable rivers. This view may be supported by what has been laid down by the Court of Sudder Dewany in the case of *Mulvee Wahed Alee v. Syed Mosuffer Ali* (1), namely, that Clause 1, Section IV, Regulation XI of 1825, applies only to navigable rivers. (See pp. 264-265 *ante*). The view taken above has also been held by the Calcutta High Court, in the case of *Ramjan Ali v. Mahasam Ali* (2), where it has been held that when a small and shallow river (such as the Gomti in that case) dries up or recedes, the subordinate Talukdar can not claim the land thus formed as an accretion to his Taluk but it is the property of the zemindar to whose estate the river belongs, and that there can be no accretion of the private land of the zemindar which forms the bed of a small and shallow river.

But the recent decision of the Calcutta High Court, in the case of *Gobind Hata v. Kristo Podo* (3) throws some doubt upon the position maintained above. That decision seems to lay down that the law of accretions would apply to non-navigable rivers entitling a tenant to accretions to his tenancy, forming a *chur* in a small and shallow river appertaining to the estate of the zemindar. This view is apparently opposed to the principle upon which the law of accretions is founded : see under "Persons not entitled to Accretions," (pp. 265-268 *ante*). It also conflicts with the current of authorities which have been cited just above. Further it seems difficult to understand the application of the doctrine laid down by the Full Bench decision, in the case of *Gourhari Kaibarta v. Bhola Kaibarto* (4), to the facts of that case. In the Full Bench case, the question was whether a tenant with the right of occupancy would be entitled to the accretion to his *jote* under Cl. I, Sec. 4, and there was

(1) (1858) Sud. D. R. 1774.

(2) 26 Ind. cases, 406.

(3) 22 Cal. W. N. p. cxv (95), Short Notes. (4) 1 L. R. 21 Cal. 233.

no question of the river being a non-navigable one. In the present case, there was a finding by the Lower Appellate Court that the river was a non-navigable one, the beds of which appertained to the estate of the plaintiff, and the question involved was, whether the plaintiff as owner of the estate was entitled to it under Cl. IV, Sec. 4. The decision in the above case of *Gobind Hata* appears to have been greatly influenced by the use of the word "*provisions*" in Cl. IV, Sec. 4, which seems not to have been taken in the sense of '*provisos*' (see pp. 485-486 *post*).

The words
"as hitherto"
refer to
established
usage in
Bengal.

"As hitherto" :—By the insertion of the expression—"as hitherto," in Cl. IV, Sec. 4, "established usage" in regard to a chur newly thrown up in small rivers has been referred to. The opinion given by the law-officers of the Sudder Court which has been quoted before (see pp. 173 & 174 *ante*), does not seem to have mentioned anything in particular with reference to sand-banks in small and shallow rivers. But a mention of "established usage" will be found in Harington's Analysis of the Laws and Regulation of Bengal, where the learned author, in a part of the foot-notes at page 252, Vol. II, relating to established usage in Bengal, said as follows :—"In small rivers, belonging to individuals, the right to a chur newly thrown up would of course vest in the proprietor of the bed of the river where the chur is formed." (See pp. 396-397 *ante*). It would thus be apparent that Mr. J. H. Harington, a Judge of the Sudder Court who had a hand in the drafting of the Regulation, was thinking of an established usage in Bengal in regard to the ownership of a chur thrown up in small rivers, according to which the chur in such a river becomes the property of the owner of the bed.

"Subject to the provisions...in the first clause of the present section" :—This portion of the Fourth Clause of Section 4, Regulation XI of 1825, deals

with the assessment of revenue by Government upon churs thrown up in small and shallow rivers. The use of the word "provisions" in the above passage appears to be misleading, as it would seem to refer to the substantive portion of the First Clause of Section 4, which declares the law relating to lands gained by gradual accession from the recess of a river or the sea, and not to the *provisos* of that clause. In fact, an argument like that was advanced in the case of *Mirza Syfoollah v. Bhuttun* (1), which was decided according to the rule laid down in Clause IV, Sec. 4. In overruling this contention, Glover, J., said thus: "The special appellant's vakil wishes to construe the last words of this, *viz.*, 'subject to the provisions stated in the 1st clause of the present section' as meaning that such lands belong to the estate to which they join; but it is clear from reading the latter part of the section in question in conjunction with clause 4, that these words do not apply to the formation or position of the newly-accreted lands, but to the owner's right in them, in relation to the Government, after they are formed; in fact, any other explanation would result in the contradiction that clause 4, section 4 of the Regulation, would in one and the same sentence declare that the owner of the bed of a shallow river had right to all sands-banks and *churs* thrown up in it, and that the same sand-banks and *churs* belonged, not to him, but to the riparian proprietor to whose estate they were joined." In this connection the distinction between Clauses I & IV, discussed before, may be referred to, (see p. 481 *ante*).

"Provisions"
should be
read as
"provisos."

The distinction between the two clauses set forth above establishes that the above portion of Clause IV, relates only to assessment of revenue, and can, therefore, be taken to mean the *provisos* to the First Clause of

(1) 10 South. W. R. 68 (69).

Section 4. In this view, it would be proper to read the word "provisions" as "provisos" to make the sense clear. See also *Ramjan Ali v. Maharam Ali Khondkar* (1).

Rivers
existing from
the time of
the permanent
settlement
are referred to

Now, referring to the rule of assessment of revenue, a question may arise, how can the *chur* in small and shallow rivers which for all practical purposes mean non-navigable rivers (see pp. 432-435 *ante*) be the subject of re-assessment of revenue? It can be said that the *churs* thrown up in non-navigable rivers formed after the date of the Permanent Settlement in a permanently settled estate cannot be a subject of re-assessment of revenue as would follow from the principle laid down by their Lordships of the Judicial Committee. in the case of *The Secretary of State for India v. Fahamidannissa Begum* (2, (see also pp. 439-441). But, in consideration of the view, that has been taken before namely, that the rivers referred to within the meaning of clause IV, Sec. 4, are non-navigable rivers which have been existing or which are presumed to have been existing since the time of the perpetual settlement between two estates, it may be said that this question would not arise. (See pp. 441-442 *ante*).

Legal
consequences
following from
encroach-
ments on the
banks by non-
navigable
rivers.

Encroachment on the banks by Private Streams :—The meaning of the word "encroachment" under Regulation XI of 1825 has been discussed previously under that head (see pp. 131-138 *ante*). It is proposed to discuss here what legal consequences would follow when a non-navigable river or any other private stream flowing between two estates encroaches on its banks. When such a river flows through the estate of a single proprietor, encroachment on its banks by the river raises a question which is very simple to answer, because every part of the estate is the land of that proprietor, whether covered by water or not. But, when such a river flows between two estates, intricate questions of

law may arise. The ordinary presumption of the law is that the riparian owner on each side is entitled to the river *ad medium filum aquæ* and the right of fishery in such a river is also regulated by the same presumption. (See pp. 446 & 457 *ante*). Now, if the river encroaches upon one side and recedes from the other, how would the ownership of the river be adjudicated? The reply would apparently be that the point would be decided by the ownership of the soil under the water. If the river by a change of its course flows entirely upon the land of one of the opposite riparian owners such owners will be entitled to the 16 annas of the river with the right of fishery therein. This view is supported by the decision in the case of *Narendra Chandra Lahiri v. Nripendra Chandra Lahiri* (1). see pp 474-76 *ante*. It would be immaterial as that decision points out to inquire whether such encroachment be *sudden* or *gradual*. If by encroachment on one side, the river-bed is shifted and covers by one-fourth of it, the land of the riparian owner on that side, then the 12 annas share of the bed would belong to the owner on the side encroached upon, and the remaining four annas of the bed would be the property of the owner of the opposite bank. This, at any rate, seems to follow from the principle held applicable to the above case. But the decision in the case of *Gobind Chunder Saha v. Khaja Abdul Gunnee* (2) would seem to lay down a contrary view. If the river in that case was a navigable one, that decision, then, would not affect the position maintained above.

It would thus appear that the distinction in the legal consequences between "encroachments" (by a river) effected *suddenly* and by *imperceptible degrees*, which prevails in the law of England, has not been uniformly followed in this country. (See pp. 131-38 & 340-46 *ante*).

(1) 4 Cal. L. J. 51 : 10 Cal. W. N. 540. (2) 6 Suth. W. R. 41 (Civ.)

ALLUVION AND DILUVION.

SECTION 4, Clause Fifth.

4. *Fifth*—In all other cases, namely, in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a river or the sea, which are not specifically provided for by the rules contained in this Regulation, the Courts of Justice, in deciding upon such claims and disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or, if not, by general principles of equity and justice.

Disputes relative to lands gained by alluvion or by dereliction not provided for by Regulation.

Exhaustive enumeration of the nature of cases to be governed by Cl. V, is not practicable.

The defects of the Regulation have been pointed out before (see pp. 3 & 4 *ante*). It would seem that the framers of the Regulation intended to remedy those defects by enacting the above clause. This clause begins with the words :—"In all other cases," "respecting land gained by alluvion or by dereliction." It does not mention distinctly what are those cases, which are to be decided by the provisions of Cl. V. Some idea of the nature of the cases to be governed by Cl. V, has been indicated by the addition of the words—"respecting land gained by alluvion or by dereliction." So, the scope of enquiry into the nature of the cases to be governed by this clause would seem to be apparently limited to claims and disputes respecting land gained by alluvion or by dereliction of a river or the sea. But, how far this limited application of that clause has been strictly observed by our judiciary will be apparent from the topics which are discussed below. To attempt to give an exhaustive list of "cases of claims and disputes respecting land gained by alluvion

or by dereliction," which are to be governed by the general principles of equity and justice as declared by Cl. V, Sec. 4 would evidently be futile. Complications of physical facts, which properly belong to the subject of the law of alluvion and diluvion, may be of such a nature as has not been hitherto contemplated. It would seem that the framers of the Regulation felt this difficulty and after providing rules for specific cases, as stated in the preceding sections, which happen commonly in this country, they left the remaining cases of *alluvion*, *dereliction*, and *encroachment*, to be dealt with by the judiciary according to the general principles of equity, and justice. It is, therefore, proposed to discuss here those cases which have actually arisen for the decision of the Courts of Justice by applying the general principles of equity and justice as declared by Cl. V, Section 4. Foremost among them, would seem to be the cases relating to Reformations on original sites.

Reformation on original site :—Under the head of "Alluvion, vertical and longitudinal," (see pp. 101 & 102 *ante*) it has been said that *churs* thrown up in large navigable rivers are nothing but vertical accretions to the bed of such rivers, and that, in cases, in which such an increment is vertically annexed to the original site, it is called what is meant by reformation *in situ*. When land is formed upon an old site which can be identified as having belonged to a particular owner, such reformed lands are called reformations on the old site. Rules relating to accretions which have been discussed before, are subject to one exception, namely, that they would not apply to the case where the accretion can be clearly recognized as having been formed on the site which formerly belonged to a known proprietor. This doctrine is nothing but an extended application of the principle involved in the cases discussed under the head of "Exceptions to the General Rule of

Reformation
in situ
explained.

Alluvion." (See pp. 265 *ante*). Claims and disputes relating to reformatiions on original sites have led to the passing of decisions which illustrate the applicability of the provisions laid down by Clause V.

Unsettled
state of the
former law
discussed

Former law relating to Reformation in situ:—Previous to the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Lopes v. Muddun Mohun Thakur* (1), the law relating to the reformation on an old site was in an unsettled state in this country. In fact, there was a divergence of judicial opinion on the point, as will be apparent from the cases which are briefly discussed below. The theories of law upon which the difference of opinion arose, related to the difference of views as to the question whether the *site* after diluviation could be regarded as the property of its original owner, and whether the right to *longitudinal* accretions was to prevail over the right to *vertical* accretions.

Reformed
land claimed
under Cl. II
and not under
Cl. V.

In an earliest case, namely, that of *Baboo Gooman Bhunjan v. Maharaja Moh ssur Buksh* (2), the land of a permanently settled mehal, which had been carried away by a river, was claimed by the plaintiff as the owner of the mehal, after its reformation under the provisions of Cl. II, Sec. 4. The defendant opposed the claim, setting up a title to the disputed land under the provisions of Cl. I, Sec. 4. The Judge of the Court below dismissed the suit, holding that the newly formed lands must be considered an increment to the estate of the defendant. The Court of Sudder Dewany, in affirming this decision, said: "We think, with reference to Clause I, Section IV, Regulation XI of 1825, that the Judge's decision is correct. It is allowed that the village Khuneeka was washed away entirely, and gradually reformed. This state of things brings the

(1) 13 Moo. L. A. 467 : 5 Beng. L. R. 521 : 14 Suth. W. R. (P.C.) 11.

(2) (1825) Suth. D. R. 10.

case under the above clause. Clause 2 of the above Section has no relevance to the case, as land, reformed as this, has lost its identity, and is incapable of recognition." In that case on behalf of the appellant it was argued that Cl. 11 of Section 4 would apply as the land in dispute formed upon the very site which was occupied by the diluviated mehal and it does not appear that any argument relying upon the general principles of equity and justice as laid down by Clause V, Section 4, was even advanced on behalf of the appellant. But, eight years after, in the case of *Rama Nath Tagore v. Chunder Narain Chowdhury* (1), the Calcutta High Court (*per* Peacock, C. J., Bayley and Kemp, JJ.) laid down thus : "The principle is that, where the accretion *can be clearly recognized* as having been reformed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner. This is founded on general principles of equity and justice, which are the principles recognized by the 5th clause. We think clause 1, section 4, applies only to cases of land gained, that is to say, formed upon a site which *can not be recognized* as that of any former proprietor." Next, in the case of *Kirtee Narain Chowdhury v. Protap Chunder Buroah*, (2) Campbell, J., dissenting from Bayley, J. said thus : "I think that, so long as the whole of the useful soil is not actually washed away by the stream, so long as the deep stream has not passed over the site in the manner that we every day see, if notwithstanding a partial submergence and washing away of the very surface soil, there still remains available for cultivation and use, the original soil or part of it, then the original proprietor may resume possession of it. Notwithstanding a flooding and temporary submergence, it may be identified by stems of trees, re-

*Ramannath
Tagore v.
Chunder-
narain.*

Reformed
land under
Cl V, belongs
to the
original
owner.

*Kirtee Narain
v.
Protap
Chunder.*

Distinction
between
complete
diluviation
and
diluviation
of surface
stratum.

(1) 1 Marsh, 136. Suth W, R, Special No, 45,

(2) Ibid. p. 129; 2 Sevestre, 88.

mains of buildings, and other surface-marks, showing that the original soil still remains. But, when the whole of the soil used by man for cultivation has been washed away, and new soil is afterwards reformed on the same site, then the new land belongs to the proprietor on that side of the river on which the new soil is thrown up, and can not be claimed by the proprietor on the other side, who lost his land by the abrasion of the river. When the whole of the useful upper soil is gone, the mere fact that the site is geographically the same, and that the sub-soil in the bowels of the earth may still be the same, will not enable him to follow and re-claim the new land."

F. B. decision in *Kattimance v. Rane* *Monmohun* restricted the application of the doctrine in *Ramanath Tagore* to the case of continuing ownership of the land in the *old site* and over-ruled it in other respects.

A Division Bench of the Calcutta High Court differing from the view laid down in the above case of *Ramanath Tagore*, referred the point for a decision by a Full Bench, in the case of *Kattimance Dossie v Rane Monmohun Dabee* (1). The learned Judges constituting the Full Bench, expressed their opinion on the point in the following terms:—"The law recognizes no right of property in a mere site, nor any such mode of acquisition as that which would confer on the proprietor of an old estate (every particle of which may have long ago disappeared or passed away) the ownership of land since formed on that site, however clearly the identity of *the site* may be established. It is only where the original owner retains his property in land on *his old site* that he can lay claim to the surface; where it re-appears above the water, and his title to this is not necessarily by accretion (because he will be equally the owner, whether the land is exposed by a sudden recess of the river, or by a gradual deposit of soil on its surface), but by virtue of his old ownership remaining undisturbed"

The passage, quoted above, contained the summary of the law which the Full Bench, in that case, intended to lay down. Mere identity of the site, as the Full Bench meant to say, itself would not be sufficient to defeat or prevent the right by accretion, which the law gives to adjacent owners, the claimant is required to prove some continuing right of property in the remnant. It is not enough for him to rely merely on the identity of site. If he can not show any assertion of ownership, such as the condition of the property admits of, for a great number of years, it may be fairly concluded that he has relinquished all right and claim to the remnant of what once belonged to him.

The rules of law that could be deduced from the above decision of the Full Bench were the following:—*first*, merely the identity of the site would not be sufficient to defeat the claim of right of accretion, and *secondly*, the decision in the case of *Ramanath Tagore* would apply to the case of a still continuing ownership in land which has disappeared by submergence beneath the surface of water. The first rule deducible from the Full Bench decision was followed in the cases of *Kalee Manee Debia v. The Collector of Mymensingh* (1), *Narainee Burmonee v. Tarinee Churn Singh* (2); *Kas-e Torabooddeen v. Sham Kant Binerjee* (3), *Gobindnath v. Nubo Coomar* (4), *Mohini Mohun Doss v. Juggobundoo Bose* (5); *Thomas Lynn v. F. F. Gray* (6), *Rashmonee Dassee v. Bhubonath Bhattacharjee* (7).

Next, turning to the second rule deducible from the above Full Bench, it would seem that in laying down that view the Full Bench followed the decision of their Lordships of the Judicial Committee of the Privy Coun-

Two rules deducible from the F. B. case

I
Mere identity of the site confers no right to the reformed land.

II
Ramanath Tagore applies to a case where the original owner retains his property in land on his old site.

Cases where the view that mere identity of site confers no right was followed.

(1) 5 Suth. W. R. 55.

(2) 6 Suth. W. R. 40.

(3) *Ibid.* 249.

(4) 8 Suth. W. R. 206.

(5) 9 Suth. W. R. 312.

(6) 11 Suth. W. R. 189.

(7) 12 Suth. W. R. 252.

Imam Bandi
v.
Hurgovinda
Ghose,
followed by
the Full
Bench
distinguishing
between
complete
diluviation
and
diluviation
of surface
stratum only.

cil, in the case of *Mussamat Imam Bandi v. Hurgobind Ghose* (1), as would appear from the following passage of the judgment of the Full Bench:—"The ownership of land is not ordinarily lost because the land itself may be submerged or inundated. The case of *Mussamat Imam Bandi v. Hurgovind Ghose* (4 Moor's, Indian Appeals, p. 403) is a striking illustration of this." In the case of *Musst. Imam Bundi*, which has been discussed before (see p. 134 *ante*) frequent changes by submergence and re-appearance of the land in dispute were not deemed sufficient to affect the question of title to such land. Thus, it is obvious that the Full Bench decision drew out a distinction between a case, where only the surface stratum is carried away by the river leaving marks of apparent identity to prove continuing right of property, and a case, where every particle of the original land is washed away leaving only bare identical site (see also the view of Campbell J., in the case of *Kirtee Narain Chowdhury* at p. 491 *ante*). The distinction thus drawn out by the Full Bench was noticed in the case of *Maharane Indurjeet v. Mohunt Fumna Dass* (2) where the right of the original proprietor to the reformed land was affirmed. How far the distinction is tenable on principle will be discussed under the head of the "Present Law relating to Reformation *in situ*." (See p. 495 *post*).

Owner of the
original site
has a
preferential
claim to the
reformed land
lying between
streams
fordable from
both banks

Another view relating to the distinction between a case where land is gained by the gradual recession of a river and where land reformed on an original site, has been adopted in the case of *Henry Maslyk v. F. F. Hedger* (3). In that case, Steer and Levinge, JJ., have held that on the true construction of Regulation XI of 1825, lands gained by the gradual recession of a river, and added by the operation of the nature to the tenure of A, must be held to be the property of A,

(1) 4 Moo. I. A. 403 (see p. 13 *ante*).

(2) 14 Suth. W. R. 164. (3) (1864) Suth. W. R. (Gap. No.) 306.

although it be also established by evidence that the land has reformed on a site which was formerly part of the property of B. If it should be proved on the evidence that the river flowed over the original site, and, receding, left the new formation, and a fordable channel between it, and B's property, B would be entitled to retake possession of the newly formed land on the old site, and he is not to be deprived of it now, because the river should be either fordable on A's side, or has become wholly dried up.

Present Law relating to Reformation in situ:—

It is apparent from the decisions which have been noticed above that the law of reformation on an original site was in an unsettled state in this country prior to the decision of the Privy Council, in the case of *Lopez v. Muddur Mohnn* (1). It is not of such importance to review at a great length the previous decisions except for the purpose of showing what were the cases overruled by the change of the law. It is obvious from what has been said before that some of the cases, to which reference has been made previously, had a clear tendency towards the view ultimately affirmed by the Privy Council, and others entertained a contrary opinion, but in none of them the authority of the decision of the Privy Council, in *Musst. Imam Bandi v. Hurgobind Ghose* (2) passed in 1848, was given effect to, to its proper extent. To this alone, the uncertainty or rather the inconsistency of the law on the subject, which prevailed in the country, can fairly be attributed. This view may be supported by the following observations of their Lordships of the Judicial Committee of the Privy Council, in the case of *Rani Sarat Sundari Debya v. Soorjya Kant Acharjya* (3), where relating to the confusion of

The conflict of opinion can be attributed to the failure of giving effect to the decision in *Imam Bunde* to its proper extent.

(1) 13 Moo. I. A. 467 : 5 Beng. L. R. 521. 14 Suth. W. R. (P. C.) 11.

(2) 4 Moo. I. A. 403 : 7 Suth. W. R. 67 (P. C.)

(3) 25 Suth. W. R. 242.

law in India on the subject under consideration, they said :—"It is well known that, as to that general law, (of reformation on an original site) there has been some doubt and confusion in the Courts of India ; and that, notwithstanding the decision of this Board in this case of *Musst. Imam Bandi v. Hurgobind Ghose*, 4th Moore's I. A. 403, the Indian decisions have been conflicting upon the point, the right principle having been laid down by a Full Bench of the High Court presided over by Sir Barnes Peacock, although subsequently disaffirmed by another Full Bench of the same Court. Until the law was finally set right by this Committee, it can not be said to have been well settled in the Courts of India, and there are traces of this uncertainty and confusion in the earlier proceedings set out in the present record."

Lopez
v.
Muddun
Mohan
Thakoor.

Now, referring to the decision of the Privy Council in the case of *Felix Lopez*, it may be affirmed at the outset that some important principles of the rules declared by the Regulation have been enunciated by their Lordships of the Judicial Committee in the judgment of that case. The rules of law relating to accretions laid down by their Lordships have been discussed before in their proper place. (See pp. 266 267). It only remains to consider what has been said in that decision regarding the law of reformation *in situ*. The facts of the case of *Lopez v. Muddun Mohan Thakoor* (1) were shortly as follows :—Felix Lopez, the plaintiff was proprietor of a very considerable estate on the banks of the Ganges. By reason of the continued encroachment of that river, it was wholly submerged, and the surface soil, the culturable soil was wholly washed away. After the lapse of some years and after one temporary recession and re-encroachment, the water ultimately retired, and the land left bare became subsequently hard

(1) 13 Moo. I. A. 467.

soil, and thus reformed on its original site. The plaintiff said :—"This was my property. The Ganges which swallowed it had again yielded it up and I claim my property, which having been buried and lost to sight has again re-appeared." The defendant opposed the claim by saying that the land in dispute was an accretion to his estate under Clause I, Sec. 4 of the Regulation. The Principal Sudder Amin decreed the claim of the plaintiff but in appeal the High Court of Calcutta reversed the decree. Against this decision, there was an appeal to the Privy Council which restored the decree of the Court of the Principal Sudder Amin. The judgment of the Privy Council was delivered by Lord Justice James, who, while discussing Clause I, Sec. 4 of the Regulation, said thus :—"It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away, ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says—'I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person.' And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another."

"And on the very words of the section itself" his

Lordship continued "if the ownership of the submerged site remained as it was (and there seems nothing to take it away,) it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property."

"If we had then to consider the question for the first time, we should have come to the conclusion that the 4th section did not govern the case, and that the question would have to be determined by the general principles of equity, to which all cases not in terms provided for referred by the 5th section. Those principles would not give the plaintiff's property to the defendant. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Bayley and Mr. Justice Kemp; and after full consideration, it was decided that lands washed away and afterwards reformed on an old site, which could be clearly recognized, are not lands gained within the meaning of section 4, Regulation XI of 1825, *viz.*, they do not become the property of the adjoining owner, but remain the property of the original owner."

"And the same point arose" his Lordship further added "in a case in this Court of *Mussumat Imam Bandi v. Hurgobind Ghose* reported in 4 Moore's Ind. App. Cases, 403. It is there said—'The whole of the District adjoining the land in dispute, as well as that land itself, is flat, and very liable to be covered or washed away by the waters of the Ganges, which river frequently changes its channel. The land in dispute was inundated about the 1787; it remained covered with water till about 1801, then became partly dry, until, in the year 1814, it was again inundated. After this period it once again re-appeared above the surface of water, and

by the year 1820, it became very valuable land.' This is a state of things very singularly like what has occurred in this case."

"In that case it was held as follows :—' The question then is, to whom did this land belong before the inundation? Whoever was the owner then remained the owner while it was covered with water, and after it became dry.' "

"This authority appears to their Lordships conclusive in the present case."

It would now be obvious from the above passages from the judgment in *Lopes's* case, that the doctrine laid down by the Privy Council previously in the case of *Mussummat Iman Bandi* was re-affirmed in 1870, and that the decision of the Calcutta High Court in the case of *Ramanath Tagore v. Chunder Narain Chowdhury* (1 Marsh. 136 : Suth. W. R. Sp. No. 45), which was overruled by the Full Bench decision in the case of *Katteemonee Dassi v. Rani Monomohini Debee* (3 Suth. W. R. 51), was approved by the Judicial Committee as laying down the correct law.

With regard to the distinction drawn by the Full Bench in the above case of *Katteemonee Dassi*, between *surface* and *site*, Lord Justice James observed as follows :—"In a subsequent case, however, *Katteemonee Dassi v. Monomohini Debee* (3 W. R. p. 51, 26th May 1865) it was held, that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases : and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification ; where there was a complete diluviation of usable land, and nothing but a useless site left at the bottom of the

Imam Bund.
v.
Hurgozind,
followed, and
Ramanath
Tagore
v.
Chunder
Narain
approved.

F B.
decision in
Katteemonee
Dasse v.
Ranee
Monmohinee
dissented fro

river. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained."

This principle not applicable to a case of abandonment or relinquishment of site.

To prevent a wrong application or an improper extension of the law laid down in the above decision, to a case of abandonment or relinquishment of the ownership of the site, Lord Justice James further added thus :—"Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation."

As a result of the decision in the above case of *Felix Lopez*, two rules relating to reformation *in situ*, can be taken to have been established, and they may be stated thus :—

(I). Land washed away and afterwards reformed on an old *ascertained site* is the property of the original owner.

(II) A site completely abandoned merges again into the public domain and land reformed upon such site is subject to the general law of alluvion.

I. Land washed away and afterwards reformed on an old ascertained site is the property of the original owner :—This proposition of law, formulated in the above case of *Felix Lopez* in 1870, has been followed uniformly in all cases arising in India after that date, as will be apparent from the decisions which are briefly mentioned below :—

In the case of *Dwarkanath Roy v. Dinobundhoo Singh* (1), the suit was pending in the Courts below, when the judgment in *Lopez v. Muddun Mohun* (13 Moo. I. A. 467) was delivered and had not been published in this country; and the decisions of the Courts were therefore in conformity with the former law. In Special Appeal to the High Court, the decree of the Court of Appeal below was modified in accordance with the rule laid down in *Lopez's* case.

Cases dealing with the law of reformation generally.

In *Baboo Puhlwan Singh v. Maharajah Moheshur Buksh* (2), their Lordships of the Judicial Committee, while discussing the second point involved in that case, approved the doctrine laid down in *Lopez's* case.

In the case of *Nogender Chunder Ghose v. Mahomed Esoff* (3), which was a suit in respect of a portion of *chur* land thrown up by a navigable and tidal river, the plaintiffs-appellants who were seeking to disturb the defendants-respondents' possession of nearly seven years, claimed the land as, and proved it to be, a reformation on a site identified with that of lands originally included in their zemindary, and afterwards swept away by the river. They were held by the Privy Council to have a better title to it than the respondents who claimed it as an accretion to their settled *chur*, but failed to prove that it was such a gradual and imperceptible accretion or *incrementum latens* as the Civil Law contemplates.

In this case, the doctrine laid down in *Lopez's* case was challenged before the Privy Council as being in conflict with the decision of that Board in the case of *Eckowrie Sing v. Heera Lall Seal* (12 Moo. I. A. 136). Their Lordships after reviewing the law of alluvion which obtains in Bengal, re-affirmed the view expressed in the case of *Lopez v. Muddun Mohun*.

(1) 15 Suth. W. R. 461.

(2) 16 Suth. W. R. (P. C.) 5; 9 Beng. L. R. 150.

(3) 10 Beng. L. R. 406; 18 Suth. W. R. 113.

In the case of *Hursuhai Singh v. Syud Lootf Ali* (1), the proposition of law laid down in *Lopez's* case was applied to land which was submerged and subsequently reformed, and could be identified as having formed part of a particular estate. It does not appear that this was a case of reformation *in situ*, and it has therefore been discussed under Cl. II, Sec. 4. (See pp. 342-343 *ante*.)

In the case of *Rani Sarat Sundari Debya v. Soorjya Kant Achariya* (2), the Privy Council discussed the confusion and conflict of opinion which prevailed in the Courts of India in relation to the law of reformations on an original site, and followed the principle laid down by that Board in the case of *Felix Lopez*.

In *Radha Prosad Singh v. Ram Coomar Singh* (3) the doctrine formulated in *Lopez's* case was re-affirmed by the Privy Council, although it was distinguished with reference to the facts of that case.

In the case of *Rani Hemanta Kumari v. The Secretary of State* (4), the plaintiff claimed the lands in dispute as reformation on the diluviated site of her permanently settled estate of pergunnah Luskarpur, and succeeded in proving that the said lands were on the original site of the said estate, as it existed at the time of the Permanent Settlement. The Subordinate Judge was of opinion that the plaintiff had very satisfactorily made out that the disputed lands were on the original site of the diluviated permanently settled estate. But, on appeal to the High Court of Calcutta, it was held that this was not sufficient to entitle the plaintiff to obtain a decree because the pergunnah was partitioned in 1839 and different mouzahs or parts of mouzahs fell to the shares of the different co-sharers, and that accordingly, the parties went to trial not upon the broad

(1) L. R. 2 I. A. 28 : 23 Suth. W. R. 8 : 14 Beng. L. R. 268.

(2) 25 Suth W. R. 242.

(3) I. L. R. 3 Cal. 796.

(4) 3 Cal. L. J. 560.

issue, whether the disputed lands were reformation on the original site of the pergunnah, but upon the narrower issue, whether they were reformation on the original site of certain specified *tarafs* and that it lay upon the plaintiff to make out the affirmation of that issue. On appeal to the Privy Council, their Lordships reversed the decision of the High Court and held that the failure of the plaintiff to identify the sites of those *tarafs* should not be regarded as fatal to her case. The defendant in his written statement did not traverse the allegation of the plaintiff's title to be a co sharer of the estate and did not mention the alleged partition and no issue was directed either to the plaintiff's title or to the partition. The plaintiff should be treated as having a *prima facie* title as co-sharer in every part of the permanently settled estate of Luskarpur which was not shown to have been alienated and no weight should be attached to a suggestion not made in the Court of first instance, where it might have been explained and met by evidence.

*Rani
Hemanta
Kumari v.
Secretary of
State.*

In the case of *Arun Chandra Singh v. Kamini Kumar* (1), the Privy Council re-affirmed the doctrine that land reformed on an original site was not land gained within section 4 of the Bengal Alluvion and Diluvion Regulation. See also *Rani Hemanta Kumari v. Maharajah Jagadindra Nath Roy* (2), and *Haradas Acharjya v. The Secretary of State* (3).

The cases, cited above, establish the general proposition of law relating to the reformation on an original site. Now, such reformation may happen to be on the opposite bank, or in the middle of the stream, as contiguous to some other islands, or as contiguous to the adjoining mehal of the original estate. A question, therefore, arises, whether there would be any

(1) I. L. R. 41 Cal. 683 : 18 Cal. W. N. 369 : 19 Cal. L. J. 272.

(2) 10 Cal. W. N. 630.

(3) 26 Cal. L. J. 590 :

Land reformed
on the
opposite bank.

difference in the application of that principle in reference to such varying physical facts. It seems *prima facie* apparent from the principle of law involved in this doctrine, (namely, that the owner of the site is the owner of all accretions vertically annexed to it) that there would be no difference, wherever such site be left by the destructive action of the river. This view can be maintained by reference to the facts of the decided cases which are cited below.

*Court of
Wards v.
Radha
Pershad
Singh.*

In the case of *The Court of Wards v. Radha Pershad Singh* (1), where the land in dispute reformed on the opposite bank of the original estate, the above question was raised directly, and while delivering the judgment, Sir Richard Couch, after reviewing all the previous decisions on the point, laid down the law thus: - "It is fully established by these decisions that, if the reformation can be identified with the original site, and the owner of it is known, the Regulation does not deprive him of his property in the reformed land which will belong to him. In those cases, I think in all of them, the reformation did not take place as it did in the present case. It would seem that in those cases the reformation began in the middle of the stream, or not adjoining to either bank of it, and gradually became annexed to the bank. But this makes no difference in the principle of the law that, if the site can be identified, the land shall belong to the owner of it. Whether the reformation is by accretion to other land or not, the right of the owner of the site ought equally to prevail." The decree in this case was varied by the Privy Council in *Radha Prosad Singh v. Ram Coomar Singh* (2).

In the cases of *Hursuhai Singh v. Syed Lootf Ali Khan* (3), and the *Collector of Moorshedabad v. Roy*

(1) 22 Suth. W. R. 238.

(2) I. L. R. 3 Cal. 796.

(3) L. R. 2 I. A. 28; 23 Suth. W. R. 8; 14 Beng. L. R. 826.

Dhunput Singh (1), the principle laid down in *Lopez's* case was applied to lands which reformed after diluviation as adhering to the opposite bank of the original estate.

As to land which reforms on an old site as an island in the midst of a river, it may be observed, as said before (see pp. 211-217 *ante*), that they come under land gained by alluvion. This was necessary to be determined before such a case can attract the operation of Clause V, Sec. 4, as that clause restricts its application to land gained by alluvion or by dereliction. The decisions which are cited below illustrate the application of the general principle of equity and justice as declared by Cl. V to islands or *churs*.

Lands reformed as islands in the middle of a stream or as contiguous to other islands.

In the case of *Monee Lall Sahoo v. The Collector of Sarun* (2), the land in dispute which was claimed by the plaintiff as having reformed upon the site, previously belonging to him, happened to be surrounded by an unfordable channel at the time of its reformation. The Courts below in consonance with the law then prevailing in this country passed judgment in favor of Government. In special appeal to the High Court of Calcutta, the decision of the Courts below was reversed in view of the fact that the decision of the Privy Council, in the case of *Felix Lopez*, had considerably changed the law, and the case was remanded to the Lower Appellate Court with a direction to decide it according to the ruling of the Privy Council.

In the case of *Nogendur Chunder Ghose v. Mahomed Esoff* (3), the doctrine laid down in *Lopez's* case was applied to land which re-appeared as *churs* on the site of the diluviated Mouzahs of the plaintiffs-appellants and gradually adhered to the *chur* of the defendants-

Nogendur Chunder v. Mahomed Esoff.

(1) 23 Suth. W. R. 38. (Civ.)

(2) 14 Suth. W. R. 424 : 6 Beng. L. R. App. 93.

(3) 10 Beng. L. R. 406 : 18 Suth. W. R. 113

respondents. In dealing with this aspect of the case, their Lordships observed as follows:—"In the present case it appears to their Lordships that such a gradual and imperceptible accretion as the law contemplates is not proved, and that there are peculiar reasons why the title of the plaintiffs should be preferred to that of these defendants. The latter do not claim the land as an accretion to their original estate. They claim it as an accretion to the chur cast up by the river, and settled with them by Government. Let it be granted that the first effect of the retrocession of the river was to leave bare this chur in the midst of the stream, and that the land then cast up was beyond the confines of the plaintiffs' estate. The river continues to recede, more land appears, and the new land, though adherent to that first discovered, is really a deposit on the ancient site of the plaintiffs' land. Why should the ownership of that which is thus regained be altered by the fact that, from some accidental cause, land forming the outer edge of it first emerged as an island?"

*Collector of
Rajshahye v.
Ranee Shama
Sunduree.*

In the case of the *Collector of Rajshahye v. Ranee Shama Soonduree* (1), the diluviated land of a portion of a permanently settled estate re-appeared as an island with an unfordable channel flowing between it and the original estate. The Government acting under Cl. 3, Sec. 4 of the Regulation took possession of it. The plaintiff (the original owner) took a lease of it from Government so that the property might not pass into other hands, and instituted the present suit. The identity of the site having been established as being part of the plaintiff's permanently settled estate, in respect of which she continued to pay her full quota of Government revenue, although the village was submerged, it was held that the submergence of the site did not deprive the owner of her property and that its re-

(1) 14 Beng. L. R. 219; 22 Suth. W. R. 324.

appearance as an island did not render it liable to be taken possession of by Government under Cl. III, Sec. 4 of Regulation XI of 1825.

In *Buddun Chunder Shaha v. Bepin Behari Roy* (1), a great part of the original estate of the plaintiff was cut off by the action of the channel of a river, but afterwards re-appeared, which for sometime lay in contiguity with the defendant's chur, separated from the plaintiff's estate by the said channel. The channel was gradually filled up till at last the reformation lay in contact with the plaintiff's estate. Under these circumstances, it was held that the reformation having taken place on the original site of the plaintiff's land, his claim was preferable to that of the defendant.

*Buddun
Chunder v.
Bepin Behari.*

In *Ranee Sarat Sundari Dehya v. Soorjya Kant Acharjya* (2) the land in dispute was found to have re-formed upon the site of a chur which had been washed away. It was held by the Privy Council that the site having been found to be capable of identification, the right of the owner of the original chur to the chur claimed was indisputable.

*Rani Sarat
Sundari v.
Soorjya Kant.*

In the case of *Ranee Hemanta Kumari Debi v. The Secretary of State* (3), the land in dispute at first appeared as an island and the Government subsequently took possession of it ousting the plaintiff-appellant. Their Lordships of the Judicial Committee having found that the chur in dispute was a reformation *in situ* of lands which before diluviation were comprised within the pergunna belonging to the plaintiff, passed a decree in her favour.

In the case of *Lopes v. Muddun Mohun* (4), where the doctrine of reformation was explicitly enunciated for the first time, the land in dispute reformed as adher-

Lands
reformed
as adhering to
a contiguous
mouza

(1) 23 Suth. W. R. 110.

(2) 25 Suth. W. R. 242.

(3) 3 Cal. L. J. 560.

(4) 13 Moo. I. A. 467.

ing to the Mouza which was in contiguity with the Mouza washed away.

The law applies whether the site be a permanently or temporarily settled estate.

It has further been held that in the application of the doctrine of *Lopez's* case, there would be no distinction whether the site be part of a permanently or temporarily settled estate. The point was raised in *Hursuhai Singh v. Syud Lootf Ali* (1), where it was argued that there was a distinction between the lands which were the permanently settled lands and land which had been in themselves an accretion and which was temporarily settled with the owner of the original estate before diluviation. Their Lordships held that no such distinction could prevail. In the case of *Ranee Sarat Sundari v. Soorjya Kant Acharya* (2), it was contended on behalf of the plaintiff-respondent that the defendants never acquired a permanent title to the original chur, or at all events, when the chur was again washed away by the river, it fell into the domain of the Crown or State; and, therefore, the defendants could not claim the existing chur as a reformation on their original chur, and that the title to it must be determined by the law of gradual accretion. Their Lordships did not accede to this argument. In the case of *Ananda Hari Basak v. The Secretary of State* (3), in delivering the judgment of the High Court, Mookerjee, J. observed thus:—"If Government permanently or temporarily settles the estate to which it has thus acquired title, the holder of the settlement is upon the authority of the decision of the Judicial Committee, *Hursuhai Singh v. Syud Lootf Ali Khan* (L. R. 2 I. A. 28 : 14 Beng. L. R. 268) clearly entitled to the benefit of the principle of reformation."

(1) L. R. 2 I. A. 28 : 23 Suth. W. R. 8 (see p. 504 ante).

(2) 25 Suth. W. R. 242 (see p. 507 ante).

(3) 3 Cal. L. J. 316 (335).

II. A site completely abandoned merges again into the public domain and land reformed upon such site is subject to the general law of alluvion :—This proposition of law, which is stated here as the second rule, has been laid down by the Privy Council in *Lopes's* case as a qualification upon the first rule (see p. 500 *ante*). In dealing with this rule, attention will be first confined to cases arising between Government and private proprietors, and among adjacent landowners. In relation to this topic the point that is to be really determined, is what constitutes "*abandonment*" within the meaning of the rule laid down by the Privy Council in *Lopes's* case, to disentitle the original owner of the diluviated site to the reformation.

Abandonment
by remission
of revenue.

According to the provisions of section 5 of Act IX of 1847 (The Bengal Alluvion and Diluvion Act, 1847) there shall be a deduction of the sadar jama (revenue payable to Government) of estates from which lands have been washed away ; (as for similar provisions of law for other Provinces, see pp. 302 & 303 *ante*). A question, therefore, arises, — what should be the effect of such deduction? In consequence of such deduction it would seem that a new settlement is entered into between Government and the owner of such estates, which leads to the inevitable result of cancelling all previous rights relating to the diluviated portions of estates ; in other words, such deduction would amount to an abandonment of the right to the site of the diluviated soil, *disentitling the original owner to the reformation*. This view might follow from the principle which has been adopted by the Calcutta High Court in the decision of the case of *Jugobundhoo Bose v. Koomoodini Kanto Banerjee* (1). In that case, the question that was raised for decision was whether the purchaser of an estate found by actual measurement the year before to consist of a certain number

Deduction of
the Sadar
Jama consti-
tutes an
abandonment
of the
diluviated
soil.

*Jugobundhoo
v. Koomoodini
Kant.*

of *beegñas* with a specified rental, can have any claim to the reformation of land belonging to the mehal as it originally stood. In answering the question in the negative, Glover, J. stated thus—“The defendat could have no claim to any reformations of land belonging to the mehal as it originally stood, inasmuch as he did not buy that mehal, but a different one of much smaller area, and greatly reduced rent. In Lopez’s case to which reference was made, the plaintiff continued to pay the original rent for the entire mehal, although a great portion of it had been diluviated, and when the land reformed on its original site, he merely recovered what he had been paying rent for all along, Had he received from Government any abatement on account of the diluvion, he would not have recovered the reformed lands.”

*Kristo Mohun
v. Collector of
Dacca.*

In the case of *Kristo Mohun Bysack v. The Collector of Dacca* (1), this point appears to have been discussed in connection with the question of the right of of the purchaser from Government of originally settled estate at a reduced jama to the reformation on the site of such estate as it stood originally. In delivering the judgment of this case, Jackson, J. referred to the above decision in *Fugobundoo Bose’s* case, in the following words:—“This case in point of fact, except that the present suit is against Government instead of being against the adjacent proprietors, and being to that extent, in our opinion, weaker, very much resembles the case, and is certainly bound by the authority in the case reported in 19 Weekly Reporter, 89.” Upon the merit of the case, the learned Judge continued thus:—“In the case now before us, the jumma, originally, Rs. 50, is now reduced to Rs. 25. That makes a very great difference, and the difference is this that the plaintiffs are, by their purchase at that reduced jumma, in the

position of a proprietor who has accepted a remission of revenue in consideration of the loss of area of the land. The plaintiffs are, therefore, in the situation referred to by the Judicial Committee in Lopez's case, which would disentitle them to the lands reformed, and in fact the lands reformed are not the lands in site of any portion of the estate sold to the plaintiffs."

It may be further added that the question, whether the reduction of the sadar jama according to the provisions of Sec. 5 of Act IX of 1847 would constitute an *abandonment* of the diluviated soil, was touched upon by their Lordships of the Judicial Committee in the case of *Nagendur Chunder Ghose v. Mohamed Esoff* (1); and there, the question was left undetermined by their Lordships with the following observations:—"Their Lordships accede to what is said in Lopez's case, to the effect that a proprietor may in certain cases be taken to have abandoned his rights in the diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847, sec. 5. For in the present case there is nothing from which such abandonment can be inferred. If an application for remission of revenue was made, that application was refused." See also the observations of the Privy Council, in the *Secretary of State v. Fahamidannessa* (2) in that part of the judgment where their Lordships dealt with sec. 5 of Act IX of 1847.

*Nagendur
Chunder v.
Mahomed
Esoff.*

The remission of revenue referred to above means a remission permanent in its nature, not a temporary remission, which *ipso facto* would not establish an *intention to abandon* the site of the diluviated soil. This view is supported by what Sir Richard Couch said, in the case of *The Court of Wards v. Radha Prosad Singh*

Temporary remission can not affect the position.

*Court of
Wards v.
Radha
Pershad.*

(1) 10 Beng. L. R. 406; 18 Suth. W. R. 113 (119).

(2) I. L. R. 17 Cal. 590 (608).

*Radhika
Mohun v.
Gunga
Narain.*

(1), referring to that portion of the judgment of the Judicial Committee in Lopez's case, where their Lordships dealt with the case of abandonment of the site. The passage in question runs thus :—"It is sufficient with reference to this part of the judgment to say that, in the present case, the plaintiff not only did not put forward any case of abandonment of site by the defendants, but there is no evidence of their having abandoned their right to the original site. In one case there was a remission of revenue, but it was only a temporary remission and can not be treated as any evidence of an intention to abandon the site." In the case of *Radhika Mohun Roy v. Gunga Narain Roy* (2), where (L. S.) Jackson and Ainslie JJ., reviewed the decision passed by them in *Gunga Narain Chowdhury v. Radhika Mohun Roy* (3), and regarding the question of the variation of the sudder jama referred to by them in their previous judgment, as a point for distinguishing the present case from that of *Fugabandhu Bose* reported in 19 *Suth. Weekly Reporter*. p. 89, they said thus :—"Now, it seems to us that these circumstances really have no bearing on the question which we pointed out as being unproved, *viz.*, that on the sale—the absolute sale of the proprietary right to the plaintiff,—there had been any alteration in the fixed sudder jumma or permanent rent payable to Government on account of the estate. The varying jummas fixed in 1851 and on other settlements now referred to, were only temporary fluctuating rents of farming leases, and those leases being only for short periods, the rent would of course fluctuate (and might vary very greatly) with the quantity of land of which the farmer was on each occasion put into possession. That question, therefore, stands exactly as it did when we last gave our judgment."

(1) 22 *Suth. W. R.*, 238 (242); . (2) 22 *Suth. W. R.* 230.

(3) 21 *Suth. W.* 115.

The observations, quoted above, clearly indicate that the remission of revenue which disentitles a person to reformation, must be of a permanent character to that extent, and it does not mean variation of jammās on account of leases for short periods.

Next as to "*abandonment*" by lapse of time, reference may be made to the cases of adverse possession under the statute of limitation. The decision in the *Secretary of State v. Krishnamoni Gutta* (1) may be taken as a case in point. In that case the whole of the disputed alluvial lands were found to have formed part of the permanently settled Zamindaries of the plaintiffs in 1827. But in 1859 the disputed lands were adjudged to be accretions to Government land and the plaintiffs took *ijara* settlement of these lands for a term of ten years; and after expiry of that term the plaintiffs went on renewing their *ijara* from year to year until 1882, for the parts of the disputed lands which were left unsubmerged. All the lands which submerged between 1859 and 1882 were next reformed and the plaintiff took possession of them in 1885, when they were ousted by Government. The plaintiff brought the suit claiming the above lands as reformations on the site of their permanently settled estate. The claim of the plaintiff in respect of the southern portion of the disputed lands was dismissed on the ground that they took successive *ijaras* from Government for a period over twelve years. They were estopped from disputing the title of Government, although it was open to them to assert their own title after the expiry of the first *ijara* for 10 years, when the estoppel came to an end. They having agreed and elected to hold that portion of the disputed lands not as a part of their Zemindari, but as part of the Khās Mehal for a period exceeding twelve years, they were bound by their acquiescence. But, with regard to the

Abandonment
by lapse of
time.

Secretary of
State v.
Krishnamoni Gutta.

(1) I. L. R. 29 Cal. 518.

'northern portion, the claim of the plaintiffs was allowed as in that case no adverse possession, in the opinion of their Lordships of the Judicial Committee, had been acquired by Government.

Now, the decision referred to above, in regard to the southern portion of the disputed alluvial land, illustrates the position that lapse of time constitutes an *abandonment* which disentitles the original proprietor to the re-formations on an old site.

*Radha Prasad
v. Ram
Coomar.*

Again, the right of the original owner to the reformation *in situ* will be lost to him, if any other person after the reformation acquires an indefeasible title to the same after long adverse possession or otherwise. This view was upheld by the Privy Council in the case of *Radha Prasad Singh v. Ram Coomar Singh* (1), long before the decision in the above case of *Krishnamoni Gupta*. In the case of *Radha Prasad Singh*, their Lordships have laid down that the original owner will not be entitled to the land reformed in an identifiable site, if another person has acquired an indefeasible title to it and that when a person acquires a title to the reformed land by adverse possession, subsequent submergence and re-appearance does not affect the question of ownership which continues in such person. (See also the discussions relating to "Abandonment by Tenants" *post*).

Evidence of
intention to
retain property
in the dilu-
viated soil.

*Lopes v.
Muddun
Mohun.*

It has been discussed before that as between Government and private proprietors, the right to the site of the diluviated soil may be abandoned by obtaining remission of revenue or by lapse of time. It is now proposed to consider what evidence is necessary to prove an *intention to retain property* in the diluviated soil. Such intention in the case of *Lopes v. Muddun Mohun* (2), was established by the production of the *Tanabundee* papers and by the evidence of the plaintiff having got the

(1) I. L. R. 3 Cal. 796 : 1 Cal. L. R. 259.

(2) 13 Moo. I. A. 467.

description and measurement of the submerged Mouzah recorded and having continued to pay rent for it. These were considered sufficient by their Lordships of the Judicial Committee in that case, to prevent the possibility of any question of dereliction or abandonment having been raised against the plaintiff. That the payment of revenue after submersion is one of the effective means of retaining property in the diluviated soil, appears to have been approved by the Calcutta High Court, in the case of *The Collector of Rajshahye v. Ranees Shama Sundari Debia* (1)

*Collector of
Rajshahye v.
Ranees Shama
Soonduree.*

But this alone cannot be considered as the only means of proving the intention of retaining property in the diluviated soil as has been pointed out by Mookerjee, J, in the case of *Ananda Hari Basak v. Secretary of State*, (2) where the learned Judge said thus :—" It was contended on behalf of the appellants that as Government does not pay revenue for land in its occupation to any body, it would be impossible to say whether Government abandoned submerged lands. but although payment of revenue or rent may be good evidence of an intention on the part of the owner of submerged lands not to abandon his right therein, this cannot be regarded as the sole test, because there may well be the submergence of lakheraj lands in respect of which no rent or revenue is paid. In our opinion no inflexible rule can be laid down as to the manner in which an intention not to abandon submerged lands may be proved, but it would depend upon the circumstances of each particular case. In many cases there may well be a presumption that the original owner intended to retain his right to the soil, unless indeed some overt act was shown indicating an intention to abandon or unless the reformation happened after a considerable lapse of time. No abandonment, however, can be justly presumed in the case before us.

*Ananda Hari
v. Secretary
of State.*

(1) 22 Suth. W. R. 324.

(2) 3 Cal. L. J. 316.

It is abundantly proved by the evidence that Government continued in possession through its lessees down to the period of submergence.....Immediately upon re-appearance, after a lapse of about eleven years. Government at once attempted to take possession and to settle the lands with tenants."

Legal presumption of retention of property in favour of the original owner.

From the above view it follows that the learned Judges (Rampini & Mookerjee, JJ) evidently intended to lay down in that case, as a proposition of law that the original owner before submergence will be presumed to intend to retain property in the diluviated soil, unless the contrary is proved or unless the reformation happens after a considerable lapse of time. At any rate, it will be a question to be determined with reference to the circumstances of each case.

Government entitled to reformation.

Persons entitled to Reformation In Situ —

Under this head it is proposed to deal with persons who are entitled to claim reformation on an old site. The case of the Government is considered first. This question was raised in the case of *Ananda Hari Basak v. Secretary of State* (1) in the following form :—"When an island has been thrown up in the bed of a public navigable river which is not the property of a private individual and the island has been taken possession of by the Government under Sec. 4, clause (3), Reg. XI of 1825 or has become an accession to an estate belonging to Government as a riparian owner, and if the island is subsequently diluviated and reformed, can Government claim the reformation?" In answering this question, Mookerjee, J. said thus:—"The only question, therefore, which arises is, whether this doctrine which is applicable to lands belonging to private individuals which have been submerged, holds good when the land before submergence belonged to Government. It is argued on behalf of the appellants that the principle is not appli-

Ananda Hari v. Secretary of State.

cable, because when under cl. (3), section 4, Reg. XI of 1825, a char or island comes to be at the disposal of Government, because it has been surrounded on all sides by the an unfordable channel or because it has become an accession to land held by Government, Government must be treated as a trustee for the public, with the result that if such island or char is subsequently diluviated, the site reverts to the public territory and upon the re-appearance of the char or island, Government cannot rightly claim any title by reformation as against a private individual to whose land upon re-appearance it may have become an accession. After a careful examination of this argument we are unable to uphold it as well-founded. In our opinion, it is not correct to say that when Government acquires property under cl. (3), section 4, Reg. XI of 1825, either as an island surrounded by an unfordable channel or as accession to lands held by Government, Government becomes a trustee for the public. Government is entitled to deal with the property in the same way as any other part of the territory of the State at its disposal. If Government permanently or temporarily settles the estate to which it has thus acquired title, the holder of the settlement is upon the authority of the decision of the Judicial Committee, in *Hursukai Singh v. Syed Lootf Ali Khan* (L.R. 2 I.A. 28) clearly entitled to the benefit of the principle of reformation. But if the question arises not as between the lessee of Government and a private individual, but as between Government itself and a neighbouring riparian owner, we are unable to see why Government should be placed in a worse position than a person who has derived title from it. No doubt section 4, cl. (3) of the Regulation places Government in this position of disadvantage that even though the bed of a public navigable river may be public territory, Government does not acquire any title to an island or char formed on

such bed, if it happen to accrete to the land of a riparian owner. But we are not prepared to carry the disability further and to hold that even though Government may have acquired title to an island surrounded by an unfordable channel or to a char which has become an accession to land in the possession of Government, Government is precluded from claiming the land upon submergence and after re-appearance. The principles upon which the doctrine of reformation rests, as explained by their Lordships of the Judicial Committee in the cases of *Lopez v. Muddun Mohun Thakoor* (13 Moo. I. A. 467 : 5 B. L. R. 521) and *Nagendra Chunder Ghose v. Mahomed Esof* (10 B. L. R. 406), appear to us to be applicable quite as much to the land in the occupation of Government at the time of submergence as to land in the occupation of a private individual ; whoever was the owner before the land was washed away would remain owner while it was covered with water and would continue to be so after it became dry."

Purchasers from Government whether entitled to the reformation of a mehal as it stood originally.

As to the right of the purchaser from Government to the land which re-forms on the diluviated site of the original mehal after the purchase, it may be said that it is a question of fact to be determined with reference to the circumstances of a particular case. If a person purchase an estate found by actual measurement the year before to consist of a certain number of beeghas with a specified rental, he can have no claim to reformation of land belonging to the mehal as it originally stood : *Jugobandhu Bose v. Koomoodini Kant* (1). In some cases it will be a question of construction of the certificate of sale as to what was sold by Government and what was purchased by a party, as was pointed out by their Lordships of the Judicial Committee, in the case of *Ranee Surnomoyee v. Watson & Co.* (2). There, the plaintiff claimed a large quantity of land as

Jugobandhu Bose v. Koomoodini Kant.

Ranee Su. no moyee v. Watson & Co.

(1) 19 Suth. W. R. 89 (11v.).

(2) 20 Suth. W. R. 211.

forming part of the char purchased by her from Government, on the ground that the land claimed by her was covered by the Touzi to which the lot purchased by her appertained at the time of the conveyance. Their Lordships of the Judicial Committee, after referring to the proceedings of the Collector in connection with the land in dispute, came to the conclusion that the Government intended to sell merely the char excluding the disputed lands.

The decision in the above case of *Juggobandhoo Bose* was distinguished in *Gunga Narain Chowdhury v. Radhika Mohan Ray* (1), on the ground that there was no reduction of revenue in the latter case as in the former, although in both cases there was a specification of the existing area of the mehal sold. The specification of the area in *Gunga Narain's* case was held not to limit in any way the import which the words of the certificate of sale bore, viz., that the whole of the Zemindaree rights which belonged to the Government passed to the purchaser. In that case, which was a suit for reformation, Jackson & Ainslie, JJ. preferred to follow the decision of Sir Barnes Peacock, in the case of *Mohini Mohan Dass* (9 Suth. W. R. 312), where the learned Chief Justice, in connection with the question of the alluvial increment, said thus:— "It is admitted that the plaintiff is entitled to the Zemindaree of Kootubpur, and that he is in possession of it; and in the absence of any evidence to show that the conveyance from the Government to the plaintiff of Kootubpore was so worded as not to pass the increment or that it expressly reserved the increment to the Government, it must be presumed that the person who is now the owner of Kootubpore is entitled to the same interest in the increment which he has in the estate to which it has become annexed." It would, therefore, seem

(1) 21 Suth. W. R. 115.

that in the opinion of Jackson and Ainslie, JJ., a purchaser of a mehal with all proprietary rights appertaining thereto will be presumed to be entitled to reformation, unless the contrary is proved, even in cases where the certificate contains a specification of the land sold.

In the case of *Kristo Mohun Bysack v. The Collector of Dacca* (1), it has been held that parties settling with Government are entitled to all the proprietary rights of the Government, including the reformed lands, unless they take the estate at a reduced *jumma* from that fixed at the original settlement. This decision would, also, seem to have upheld the view that the right of the purchaser from the Government to the reformed land of the mehal as it originally stood may be presumed in favour of such person, unless a reduction of sadar jama in consequence of diluviation of the original mehal is established.

The above two cases of *Gunga Narain Chowdhury* (21 W. R. 115) and *Kristo Mohan Bysack* (24 W. R. 91) were distinguished in the case of *Gholam Ali Chowdhury v. The Collector of Backergunge* (2). In that case, the plaintiff purchased a char from Government in March 1871, subject to an annual rent, with road-cess, of Rs. 5,000. He next brought a suit in respect of the land in suit claiming it as reformation on the old site of the char as it stood in 1859, shown by the Thak Map of that year. The proceedings of the Collector showed that the char since its formation had been four times measured by the orders of the Collector and that on each occasion the area of the char had varied. At the last measurement its contents were found to be 3,994 acres, which is the quantity of land more or less stated in the proclamation of sale, under which the plaintiff purchased. These proceedings also show that after each survey the

(1) 24 Suth. W. R. 91 (Civ).

(2) 2 Cal. L. R. 39.

char was settled permanently with different persons at varying rents, which were on each occasion calculated with reference to the area which was found at each measurement to be contained in the chur, *e. g.* in 1868, 13,528 and odd beeghas of land for Rs. 9,240; in 1869, 12,104 and odd beeghas=3,994 acres, for Rs. 9,115. The settlement immediately preceding the plaintiff's purchase, namely, the settlement of 3,999 acres of land for the year 1870, was at a reduced Jama, including road-cess, of Rs. 5,000, to which the mehal after plaintiff's purchase was subject. It also appeared from the rubokaree that no measurement was made of the chur between 1847 and 1867, when it was in the occupation of the Ijaradar for twenty years, immediately from 1847. From the above state of things the learned Judges (White and Mitter, JJ.) came to the conclusion that the large area which was found to exist at the *thak* measurement in 1859 must have been caused by accretion of 'land' to the chur which had taken place after 1847 and been swept away before 1867, and next, they said thus: "It is clear that the 1,498 beeghas now claimed by the plaintiff were never surveyed or settled by the Collector; nor was any revenue paid or claimed by Government in respect of the same. Having regard to the history of the chur as disclosed by these rubokarees, and the description of the property as contained in the proclamation, there can, I think, be no reasonable doubt that the mehal which the plaintiff purchased in 1871 was the chur as it existed in point of size and area on the 1st of Bysack 1278 and that he has no right to claim the 1,498 beeghas as part of his purchase."

The points for distinguishing the last case from the previous two cases, as laid down by the learned Judges, were these: (i) that the parties in the two cases bought a mehal consisting of a chur, but subject to an annual jama which had been fixed at a time when the char

was larger than when they bought it : (ii) that the land claimed in those two cases, reformed upon an old site which was treated as part of the mehal, upon which revenue was levied by the Government, subject to which the parties purchased.

The question of reformation as between landlord and tenant—discussed.

Hemnath v. Asghur.

It is, next, proposed to deal with the question as between landlord and tenant (see p. 509, *ante*.) Regarding the right of a tenant to the reformation on an old site, the earliest decision to which reference can be made is the decision in the case of *Hemnath Dutt v. Asghur Sindar* (1). In that case lands held by the defendants as tenants with the right of occupancy, were completely submerged, and remained so for a number of years. No rent was paid by the tenants during the period of submersion. The lands subsequently reappeared and were taken possession of by the tenants, when they had become culturable. The plaintiff thereupon instituted the suit for recovery of *khas* possession of these lands. Courts below dismissed the suit, holding that the right of occupancy was not extinguished but remained in abeyance during the period of submersion, and that immediately upon their reformation, the defendants having asserted their right by commencing cultivation, their occupancy right had been maintained.

On appeal to the High Court, that decision was reversed. Jackson & McDonnell, JJ., held that the payment of rent, which would have maintained their right of occupancy as contemplated by the order of the decision in the case of *Lopez Muddun Thakur* (13 Moo. I. A. 467), not having been made during the period of submersion, the tenants forfeited the right of occupancy. In this case, mere non-payment of rent during the period of submersion was considered sufficient to constitute an *abandonment* of property in the diluviated site.

(1) 1, L. R. 4 Cal 894.

The above decision appears to have been followed in the case of *Saligram Singh v. Puluk Pandey* (1). In that case, the plaintiffs were in possession of an agricultural holding of 40 bighas, situate in Government Khas Mehal till the year 1872. In that year, the lands were diluviated and the site of the holding remained submerged under water down to 1892. No rent was paid by the plaintiffs in respect of these lands which re-appeared in 1902, and became culturable. Upon these facts the High Court of Calcutta held that although mere non-payment of rent might not be conclusive evidence of abandonment, but non-payment of rent taken along with submergence of land was sufficient to indicate an extinguishment of the right of occupancy. In the result, the old occupancy right of the plaintiffs who entered upon the reformed land under a fresh temporary settlement from the Government, was declared to be non-existing. In deciding this case the High Court appears to have relied upon the principle laid down by the Judicial Committee in the case of *Lopes v. Muddun Mohun* (2), where it was pointed out that a person whose lands had been submerged might take the most effective means in his power to prevent the possibility of any question of dereliction or abandonment being raised against him, and that the payment of rent after submersion was one of the effective means.

*Saligram v.
Puluk
Pandey.*

Whether an
occupancy
tenant not
paying rent
during the
period of
submersion
is entitled to
reformation.

The above two decisions would, therefore seem to support the view that submersion of land with the right of occupancy followed by non-payment of rent for a number of years, amounts to an *abandonment* of property in the diluviated site of such occupancy holding.

A question, next, arises how far the above two decisions can be accepted as laying down the correct law on the subject in the face of the decision of their Lordships of the Judicial Committee, in the case of *Arun*

(1) 6 Cal. L. J. 149.

(2) 13 Moo. I. A. 467.

*Arun
Chandra v.
Kamini
Kumar*,
decided by
the Privy
Council.

A permanent
heritable
tenure-holder
is entitled
to reformation
even when
remission of
rent is
granted.

Chandra Singh v. Kamini Kumar (1). In that case, the plaintiffs-appellants, were the zemindar of Pergunna Bhulua in the District of Noakhali. Within this zemindari lay the putni tenure called Taluk Ram Saran Pal created long ago by one of the predecessors in title of the zemindars. The Taluk was owned by the first two defendants, who were respondents in the appeals and other respondents being tenants in the lands. Plaintiffs in 1843 obtained rent decrees for additional lands found upon measurement in the possession of the defendants. Subsequently, a considerable part of the putni tenure was washed away for which the defendants obtained proportionate remission of rent in 1889. After a few years, the diluviated lands re-appeared and admittedly re-formed *in situ*. Disputes arose for possession of the re-formed lands which culminated in the present suit being brought by the zemindars in 1906. In the plaint the relief sought for asked for *khas* possession or in the alternative for recovery of proper rent. Upon those facts, their Lordships of the Judicial Committee said:—
“In the present case there is nothing to show that, by claiming or accepting remission of rent in respect of lands washed away from time to time by an action of the river, the defendants abandoned, or agreed to abandon, their rights to such lands on their reformation *in situ*, as is admittedly the case here. The diluviated lands formed part of a permanent, heritable, and transferable tenure; until it can be established that the holder of the tenure has abandoned his right to the submerged lands it remains intact.”

It would be apparent from the above decision of their Lordships of the Judicial Committee that, in that case, they intended to lay down as a proposition of law that mere remission of rent in respect of land washed away

(1) 1 L. R. 41 Cal. 683; 18 Cal. W. N. 369; 19 Cal. L. J. 272; 12 All. L. J. 243; 16 Bom. L. R. 323.

from a permanent, heritable tenure would not constitute an *abandonment* of property in the diluviated site. According to their Lordship's view, it would seem that some overt act in addition to abatement of rent was needed in that case, to disentitle the putnidar-defendants to the lands reformed *in situ*. What else could possibly be the evidence of an intention to abandon property in the diluviated site, which would deprive a tenureholder of the right to reformation *in situ*, as laid down in the case of *Felix Lopes* has not been indicated in that decision. Their Lordships, while expressing their view, overruled the decision of the Calcutta High Court, in the case of *Hemnath Dutt v. Ashgar Sindar* (1), in the following words:—"The learned Judges of the High Court appear, however, to have laid too much stress on the terms of the *Kabuliya*t and the evidence of intention deducible from the various proceedings in respect of additional rent and abatement of rent. They evidently felt pressed by an older ruling of the Calcutta High Court in *Hemnath v. Ashgar Sindar* (I. L. R. 4 Cal. 894). Their Lordships, however, do not find themselves in accord with the rule of law expressed in that case. They think that the principle applicable to this class of cases is correctly enunciated in *Mazhar Rai v. Ramgat Singh* (I. L. R. 18 All. 290)"

Hemnath v. Ashgar,
overruled
by the Privy
Council.

From the report of the case it further appears that the decision of the Calcutta High Court in the case of *Saligram Singh v. Puluk Pandey* (2), was also referred to in the argument which was addressed to their Lordships on behalf of the appellants. Although in the judgment nothing has been said about that case yet from the tenor of the decision it can very well be taken that the ruling, which had not followed the above Allahabad case of *Mozhar Rai*, has also been disapproved.

(1) I. L. R. 4 Cal. 894.

(2) 6 Cal. L. J. 149.

The effect of
the decision
of the Privy
Council—
discussed.

The effect of the above decision of the Privy Council, which overruled the decisions of the Calcutta High Court in the cases of *Hemnath v. Ashgar* and *Saligam v. Puluk Pandey*, can be stated thus, that even in cases of occupancy holdings, when submersion of lands is followed by non-payment of rent for a number years, it would not amount to an *abandonment* of the right to reformation on an old site; in other words, non-payment rent for a number years in respect of diluviated soil would retain property in the diluviated site.

Now, the question of abandonment of an occupancy or non-occupancy holding, in Bengal, is to be determined according to the provisions of sec. 87 of the Bengal Tenancy Act (Act VIII of 1885). It may be premised at the outset that there is no distinction between *surface* and *site* as has been pointed out by the Privy Council in the case of *Felix Lopez* (see p. 499 *ant*); and that what constitutes an *abandonment* of the surface land would also constitute an abandonment of the site after diluviation. Non-payment of rent for a number of years coupled with non-occupation and non-cultivation of the land under the provisions of the Bengal Tenancy Act would establish abandonment of occupancy holding: [see *Muneeeruddeen v. Mahomed Ali* (1) *Nilmony v. Sonatun* (2) and *Madar Mandal v. Mahim Chandra* (3)]. The facts of the above two Calcutta cases (see pp. 522-23 *ante*) evidently fulfil these conditions. But two points in connection with the two Calcutta cases should be noticed, namely, (i) that the submersion of land was followed by non-payment of rent, which is an exemption to which the tenants were entitled under Section 52 of the Bengal Tenancy Act and which right could not be taken away from them according to the provisions of Sec. 178, Sub. Sec. (3), Cl. (f), and (ii) that non-occu-

(1) 6 Suth. W. R. 67 (Civ.). (2) I. L. R. 15 Cal. 17.

(3) 3 Cal. L. J. 343 (346).

pation and non-cultivation of the land was the result of submergence and not a voluntary act of the tenants.

With regard to the above 2nd point, it may be contended that non-occupation and non-cultivation of land by reason of its submergence would render the original intention of letting out the holding absolutely ineffective. The right of occupancy which is not a proprietary right, is originally acquired from the fact of being a settled raiyat of a village, and the settled raiyat is a person who has held land continuously for a period of twelve years for agricultural or horticultural purposes. (See Secs. 20 and 21, Bengal Tenancy Act, 1885). Hence it can be said that the right of occupancy is derived from the use to which the land has been put. Now, if such use of the land is rendered impossible, by the fact of the land not being in existence, how could the right survive, when the foundation has disappeared? It may be taken as a case of dispossession of land by *vis major*, which has the effect of voluntary abandonment, as was pointed by their Lordships of the Judicial Committee, in the case of *Secretary of State v. Krishnamani Gupta* (1) where the right which can be created by long possession, was claimed.

Next, with regard to the first point, noticed above, it may be urged that the destruction of the subject-matter of the right of occupancy as stated above, is to be taken along with non-payment of rent, which has the effect of putting an end to all relations and obligations between the landlord and the raiyat. A complete diluviation of the land with occupancy right may exempt such occupancy raiyat from payment of rent in respect of such holding: see *Rajendra Kumar Ray v. Maharaja Manindra Chandra Nandi* (2). When such right is exercised by the raiyat, the last vestige of his right disappears, so as to bring him within the excep-

(1) I. L. R. 29 Cal. 518 (535).

(2) 24 Cal. L. J. 162.

tional case, where no effective means is taken to prevent the possibility of any question of abandonment being raised against the original owner as has been observed by their Lordships of the Judicial Committee, in the case of *Lopes v. Muddun Mohun Thakoor* (1). If non-payment of rent in respect of submerged land for a period over twelve years, as in the Calcutta case of *Saligram Singh*, be not sufficient to disentitle him to the site of the diluviated soil of a holding, then, in every case, where a holding is absorbed by a river, it may, under all circumstances and after any lapse of time, upon re-appearance, be recovered by the tenant, which is contrary to the rules declared by the Privy Council in *Lopes's* case. (See p. 500 & 509 *ante*).

A case of
extreme
hardship
upon the
landlord.

It is also possible to conceive of a case of extreme hardship upon the landlord who may have to pay the Government revenue in respect of the diluviated soil, although he himself is not entitled to get any rent from the tenant for the land. By payment of revenue the landlord retains the right to the site of the diluviated soil, but the land upon its re-appearance is to go to the tenant who had not paid any rent during the period the land was under water. It has been stated before that if a proprietor get remission of revenue, he is not entitled to the reformed land (see pp. 509-10 *ante*). If his right is terminated by reason of the deduction of sadar jama on account of diluvion, his tenant can not have any right to the reformation *in situ*. Consequently, it can be contended that in those cases where this position would be correct, the proprietor is to keep alive the right of the tenant without being entitled to get anything himself from such tenant during that period however long it may be.

It should, however, be observed that notwithstanding the difficulties urged above it would follow from the

decision of the Privy Council, in *Arun Chandra Singh v. Kamini Kumar* (1), that the present law which is applicable to the cases of this description in Bengal is what has been laid down in the Allahabad case of *Mazhar Rai v. Ramgat Singh* (2).

As to the decision of the Allahabad High Court in the case of *Mazhar Rai v. Ramgat Singh* (2) which has been approved by their Lordships of the Judicial Committee, in the case of *Arun Chandra Singh v. Kamini Kumar* (1), it may be noticed that that case was decided in view of the provisions of the Ren. Act (No. XII of 1881) for the North-Western Provinces. This Allahabad case has been referred to and distinguished in the Calcutta case of *Saligram Singh v. Puluk Pundey* (3), where Mookerjee, J., in delivering the judgment of the Court, on this point said thus: "We observe that the learned Judges of the Allahabad High Court in *Mazhar Rai v. Ramgat Singh* (I. L. R. 18 All. 290), declined to follow the rule laid down in *Hem Nath v. Asghar* (I. L. R. 4 Cal. 894) on the ground that under the North-Western Provinces Rent Act (XII of 1881), a tenancy of agricultural lands once entered upon, continues until determined by effluxion of time or by mutual consent or in one of the ways provided for by the statute. No such considerations, however, apply to cases under Act VIII of 1869 B. C. and we see no reason to depart from the rule laid down by this Court in *Hem Nath Dutt v. Asghar Sindar*."

Tenant's
right to
re-formation
in the N.-W.
Provinces.

In the case of *Mazhar Rai v. Ramgat Singh* (2), the lands of a certain village Rampur within the zemindari of Maharaja of Dumraon were washed away by the stream of the Ganges and subsequently thrown up by the alteration of the course of the stream. The tenants represented by the plaintiffs claimed the lands as being

*Mazhar Rai
v. Ramgat
Singh.*

(1) I. L. R. 41 Cal. 683. (2) I. L. R. 18 All. 290.

(3) 6 Cal. L. J. 149.

identical with their former holdings and the tenants represented by the defendants also set up a similar claim by virtue of a settlement made with them by the Maharaja after the emergence of the lands, and contended that the plaintiffs having ceased to pay rent during the period of submersion should be taken to have abandoned their holding and the subsequent settlement by the Maharaja with the defendants created a valid title in their favour. Upon this contention, the Allahabad High Court (*Pei Edge*, C. J., and *Burkitt* J.) held that mere non-payment of rent without any overt act could not amount to a relinquishment of the holding by the plaintiffs.

In regard to the Calcutta decision in the case of *Hem Nath Dutt* (1), the learned Judges of the Allahabad High Court, in that case, observed thus "Undoubtedly, according to the view expressed in one of those cases by the Calcutta Court, the plaintiffs after the submergence of lands held by them lost all rights of tenancy in the lands by non-payment of any rent for those lands. We cannot agree that the view of the law there expressed, though it may be sound in lower Bengal, is applicable to these Provinces. As we understand the different Rent Acts (No. X of 1859; No. XVIII of 1873, and No. XII of 1881) which have been applicable in these Provinces, the tenancy of a tenant of agricultural land can only be determined in one or other of the manners mentioned in the particular Act applicable at the time. * * * But it appears to us that the several Rent Acts which have been applicable in these Provinces assume that a tenancy once entered upon continues until determined by effluxion of time, or by mutual consent, or in one of the ways provided for by statutory enactment, and that mere non-payment of rent does not of itself determine the tenancy (2)."

It may be noticed in this connection that there was

(1) I. L. R. 4 Cal 894.

(2) I. L. R. 18 All. 290 (294)

no provision for "abandonment" of tenancy under Act XII of 1881 (The North-Western Provinces Rent Act), which by Sec. 31 only enacted rules for relinquishment. But, turning to the North-Western Provinces Rent Act of 1901 (No. II of 1901 U. P.) which repealed Act XII of 1881, it will be found that there is a section, namely, Sec. 87 which lays down the provisions of "abandonment" similar to those prescribed by Sec. 87 of the Bengal Tenancy Act (VIII of 1885).

Next, the effect of "mere non-payment of rent" has been further discussed by the learned Judges of the Allahabad High Court, in the following words :—"We were asked to infer an intention on the part of these tenants to abandon their tenancy in the submerged lands. It is possible that if the landlord had, while the lands were submerged, claimed rent from them, and on their refusal to pay had obtained a decree and served notice of ejectment upon them, such an inference might be drawn ; but we cannot find as a fact from their merely sitting quiet and doing nothing that they intended to relinquish all rights in land which any year might emerge from the Ganges and become culturable. We find that their tenancy did not in fact determine in any of the ways provided for by the Rent Act or by agreement, and we consequently find that when the lands did emerge from the water owing to a change in the stream of the Ganges, the plaintiffs, being still tenants of those lands, were entitled to the possession of them (1)."

With reference to the above passage, quoted from the judgment of the Allahabad Court, in the above case of *Mazhar Rai*, it may be said that it does not appear clear whether their Lordships of the Judicial Committee, in the case of *Arun Chaudia Singh* (2), while approving the decree did as a matter of fact approve the view expressed by the Allahabad High Court in that passage. For, in

(1) I. L. R. 18 All. 290 (294-95).

(2) I. L. R. 41 Cal 683.

the case awaiting decision before their Lordships, the defendants putni tenure-holders within the zemindary of the plaintiffs were granted remission of rent by the Court. But this fact was not considered by their Lordships sufficient to constitute an abandonment of property in the site of the diluviated soil.

Right to
reformation
in situ of
occupancy and
hereditary
tenants in the
Punjab.

In the Punjab, it seems to be practically settled law that a tenant with the right of occupancy, in the absence of a custom to the contrary, is entitled to the reformation *in situ*. This view has been held in a number of cases which are briefly noticed below.

Sahib Rai
v. Khair Sha.

In the case of *Sahib Rai v. Khair Sha* (1), it has been held that when land which has been submerged reforms and forms by accretion part of a particular estate, the owner of that estate is entitled to it. This rule refers to the accretion to the land cultivated by a tenant with right of occupancy and gives the tenant the right to take possession of, and cultivate the land so reforming. The fact that land remained submerged or unclaimed for several years did not affect the tenant's right though the cultivating right was lost by abandonment or voluntarily ceasing to occupy.

Rutta v.
Mal Singh.

In *Rutta v. Mal Singh* (2), the right of hereditary tenants to lands which had reformed after submergence was discussed, and it was held that they were entitled to take possession of such lands. But it was also pointed out in that case that delay in taking possession or in asserting occupancy right might operate as an equitable estoppel and bar the claim under the law of limitation. See also No. 83, Punj. Rec. 1876.

Full Bench
decision in
Sultan Khan
v. Syed
Ahomed
Sha.

All the above decisions were approved in the case of *Sultan Khan v. Syed Mahammed Sha* (3), which was decided by a Full Bench consisting of three Judges of the Chief Court. The plaintiff in that case, who had

(1) 1876 Punj. Rec. No. 19.

(2) 1876 Punj. Rec. No. 122.

(3) 1877 Punj. Rec. No. 59.

been a hereditary tenant in Mouzah Khai, Tahshil Khushab, lost part of his land by the action of the river Jhelum between the years 1863 and 1866. The land remained submerged for some years and re-appeared *in situ* in 1868 and 1869 when the river receded. After its re-appearance the defendants who had been the proprietors took possession and made arrangements for its cultivation. The land which was not carried away became *banjar* of the village, and the revenue on it was paid by the plaintiff, and the defendants paid the revenue upon the submerged land. The disputed land was, at the time of its submersion, not bounded by a shifting river bank, but by fixed lines and susceptible of being at any moment ascertained. It was not claimed immediately on its re-appearance because the tenants did not know until recently that they had retained rights in land after it was submerged. Such non-claim was not shown to have induced the proprietors to alter their position for the worse, the fact being that both parties were under a mistaken impression as to their respective rights. Under those circumstances, in the suit instituted by the tenant to recover his occupancy right in the reformed land, it was held by the Chief Court that, no custom to the contrary being proved, the tenant had not lost his occupancy right by reason of the land being submerged. It was further held that the tenant had not voluntarily abandoned his land on its re-appearance and that, under the above circumstances, the tenant was not estopped from asserting his rights merely by reason of his having stood by and allowed the proprietors to act as if those rights had been abandoned.

Lindsay, J., in a part of his judgment said :—"It has been well established that a tenant with rights of occupancy has an interest in land which he can recover within the period of 12 years from his cause of action. Case after case in this Court have established this rule

Per Lindsay, J.

of law. But there may be circumstances that estop the tenant from asserting his claim."

Boulnois, J.

Boulnois, J., in the same case, while delivering his judgment, laid down the law in the following words:—"It is clearly the opinion of the majority of the Judges of this Court that, in the absence of custom to the contrary, the land occupied by an hereditary cultivator, whether carried away by, or submerged in, a river is not lost to him, if it is thrown up again by the river or is left uncovered by the water."

"The land which appears on the same site, if it be identifiable, and if it be not identifiable, provided that the site be the same, is subject to his occupancy rights according to the principles laid down in the case of *Lopez v. Muddun Thakoor* (1) followed in this Court in No. 19 Punj. Rec. 1876."

Fitzpatrick, J.

In the same case, Fitzpatrick, J., while dealing with the hardship which the exemption of the tenant from payment of rent during the period of submersion may entail upon the proprietor who may have to pay revenue upon the submerged land, said thus:—"Where as in the present instance, the area of the land submerged is less than ten per cent. of the whole village area, and the revenue is accordingly not remitted, there may seem to be some hardship in the proprietors having to make good, out of his own pockets, the revenue on land in which the cultivator has the more valuable interest, but there is really no hardship at all, inasmuch as if the proprietors lose in this way in years when there is a decrement of less than 10 per cent, they gain in another year in which there is an increment of less than 10 per cent which they hold revenue free."

The view laid down by the above decision of the Full Bench was followed in the case of *Lal Shah v. Karim Buksh* (2).

(1) 13 Moo. I. A. 467.

(2) 1879 Punj. Rec. No. 96.

In *Morid v. Musst. Ram Dasi*, (1) following the Full Bench decision, it was held that the occupancy right was not extinguished by submersion.

With regard to the exemption from payment of revenue, it was held that non-payment of revenue on the land during the period of submersion was not fatal, as the plaintiff was not bound to pay where there was no land, and that the plaintiff was entitled to recover the land on payment of revenue paid upon it by the proprietor the defendant, since the date of its re-appearance.

This view was followed in *Raja v Sarfayas* (2). See also 1879 Punj. Rec. No. 52; 1876 Punj. Rec. No. 61; 1889 Punj. Rec. No. 125; 1898 Punj. Rec. No. 36.

In the case of *Roshan v. Pohu* (3), the Financial Commissioner has held that the general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged and that a custom to the contrary may be proved, but such custom has not been established in Alwalpur village, in the Hushiarpur District. See also *Hashmat v. Dulla*, 1901 Punj. L. R. No. 171.

*Roshan v.
Pohu.*

In *Dewa Singh v. Bishambar Das* (4), it has been held that according to the custom of the village Pakhiwan in the Gurdaspur District the land of occupancy tenants which is recovered from the river Ravi after submersion will be restored to the tenant and not revert to the proprietor.

*Dewa Singh
v.
Bishambar.*

In the case of *Chiragh v. Turel Khan* (5), the question has been whether a Malik Kabza is entitled to the reformation *in situ*. It has been found in that case that in Mouza Shergarh, Tahsil Khushab, in Shahpur District, there is no established custom by which a Malik Kabza

*Chiragh v.
Turel Khan.*

(1) 1879 Punj. Rec. No. 127.

(2) 1883 Punj. Rec. No. 52.

(3) 1901 Punj. L. R. No. 54.

(4) 1905 Punj. L. R. No. 184; Punj. Rec. No. 80.

(5) 1880 Punj. Rec. No. 1.

Right of a
Malik kabza
to reformation
in *Situ*.

loses his right in lands which have been submerged by river-action, and, therefore, applying the general law laid down by the Full Bench (No. 59 of 1877) it has been held that a Malik Kabza, whose land has been submerged and has afterwards emerged, is entitled to recover on its re-appearance whatever proprietary interest he had in the land before submersion.

Adna Maliks
as against
Ala Maliks.

*Ghulam
Mohayuddin*
v.
Faiz Bakhsh.

In *Ghulam Mohayuddin v. Faiz Bakhsh* (1), the plaintiffs were *Adna Maliks* in the village whose lands after having been submerged by the river Chenab had recently come out and been taken possession of by the defendants, the *Ala Maliks*. In the suit, instituted by the *Adna Maliks*, they claimed the recovery of the lands and were met by the plea that under the provisions of *wasib-ul-ars* of 1879, their rights had been lost in consequence of submersion. The custom set up by the defendants, referring to the entry in the *wasib-ul-ars*, was not established, and upon the application of the principle, namely, that the owner of land which is under water retains his right to the site, which is a principle not peculiar to any system of municipal law but is one founded on universal law, and justice, it was held that the claim of the plaintiffs to the reformed land was established.

Isar Das v.
Ghulam
Haider.

In *Isar Das v. Ghulam Haider* (2), according to the entry in the *wasib-ul-ars* which was to the effect that if lands are washed away and subsequently reappear, the original proprietors are entitled to recover the same on payment of certain fixed dues to the *Ala Maliks*, it has been held by the Punjab Chief Court that the owner could only recover the lands from the *Ala Maliks* on payment of customary dues.

There does not appear to be any decided case in Bengal on the question whether a *lak'irajdar* or rent-

(1) 1902 Punj. Rec. No. 97 : 1902 Punj. L. R. No. 121.

(2) 1912 Punj. L. R. No. 31.

free tenure-holder is entitled to the land which reforms on the diluviated site of his holding. But, in the application of the principle enunciated in the case of *Felix Lopez*, (see p. 496 *ante*) it does not appear that any such distinction was intended to be made between lands which are rent-paying and which are not rent-paying. In fact, the observations made by the Calcutta High Court in the case of *Ananda Hari Basak v. Secretary of State* (1), would seem to support the view. In that case, Mookerjee, J., while dealing with the payment of revenue or rent as evidence of intention not to abandon the holding, said thus :—" Although payment of revenue or rent may be good evidence of an intention on the part of the owner of submerged lands not to abandon his right therein, this can not be regarded as the sole test, because there may well be the submergence of lakhiraj lands in respect of which no rent or revenue is paid. In our opinion no inflexible rule can be laid down as to the manner in which an intention not to abandon submerged lands may be proved, but it would depend upon the circumstances of each particular case." From this passage it would seem that if lakhiraj lands be submerged, in the absence of any evidence to prove an intention to abandon the right to such submerged land, the lakhirajdar will be entitled to them on their reformation on the old site.

Right of
Lakhirajdars
and Mafidars
to reformation
in situ.

Ananda Hari
v.
Secretary of
State.

The Full Bench decision of the Punjab Chief Court, in the case of *Karim Baksh v. Alla Jowaya Khan* (2), also tends to support the above view. In that case the plaintiff was recorded a *Mafidar* at the settlement with the right to take *batai* in respect of 37 ghomaos and of land of which the defendants were recorded proprietors and which was cultivated in part by the defendants, in part by tenants with occupancy right, and in part by tenants-at-will, and the revenue was levied accordingly

Karim
Baksh v.
Alla Jowaya
Khan.

until 1869 when the land was submerged. In 1873, a considerable portion of it reappeared and was taken possession of by the proprietors and had since been cultivated in part and in part used by them as grazing lands, the revenue being fixed at Rs. 10-12 0 which the defendants did not dispute their liability to pay in cash. In the suit, brought by the plaintiff for the value of the half of the produce of the land according to previous settlement, it was ultimately held by the Chief Court (*per* Plowden and Smyth, JJ, and Elsmie, J. dissenting) that the mutual rights and obligations of the portion survived in their integrity notwithstanding the occurrence stated above, and, therefore, the plaintiff was entitled to recover the value of the half produce as claimed, until the completion of a new settlement.

Right to
reformation
in situ of
purchasers at
private sales.

As to the right of a purchaser at a private sale to reformed land of the mehal, portions of which were diluviated previous to his purchase and subsequently re-appear, it can be maintained that it would be a question to be decided upon the construction of the intention as to what was sold and purchased. If the whole mehal, as it stood originally, was sold and purchased with its old *jama*, there does not appear any intelligible reason why the purchaser will not be entitled to the land which reforms on the diluviated site of the mehal. The principle of law that is applicable to such cases would seem to be the same which was applied to the cases of purchases from Government. (See pp. 518-521 *ante*).

Purchasers
at sales
in execution
of a decree.

In regard to the right of the purchaser at sales held in execution of a decree to the land which reforms in the diluviated site of the estate purchased by him, it would seem that the determination of such question depends upon the construction of the sale-certificate. In connection with this point, reference may be made to the two Allahabad cases which have been discussed at

length in relation to the right to accretions. (See pp. 260-262 *ante*.)

Diluvion :—The term *Diluvion* has been defined before in connection with the definition of the word *encroachment* (see pp. 132-133 *ante*), which has been used in the Regulation to denote the changes effected by the action of the river known as Diluvion. There, it has been further noticed that the word diluvion has not been used anywhere in the Regulation except in the title, nor there is any specific provision made by the Regulation in regard to diluviated lands. The topic of *diluvion* should, therefore, be classed as one coming under Clause V, Sec. 4, which lays down rules for cases not specifically provided for by the Regulation.

It is possible to conceive some distinction between the cases of *Inundation or Encroachment* and *Diluvion*, while considering them from their physical aspect. In cases of *Inundation or Encroachment*, there is only submersion of land or at best it is a case where the surface-stratum is washed away, and with the recession of the river the land reappears. But, in the case of *Diluvion*, there is complete absorption of the land by a river or the sea, leaving merely a site which is only a part of the river-bed or sea-bottom, and in such a case, land reappears only when it reforms by a gradual deposit of the soil, which may be called vertical accretion of the land to the site. This was the distinction which the Full Bench was evidently contemplating in the case of *Kattemonee Dassee v. Monmohini* (1). The Calcutta High Court, in that case, apparently intended to lay down that the right of the previous owner would continue in the case of *Inundation*, but in the case of *diluvion* as understood above, the right of the original owner will cease to exist and such site would become public property.

Physical
aspect of
Diluvion
and *encroachment*.

Legal aspect.

But the distinction drawn out above would seem to have been overruled by the Privy Council in the case of *Felix Lopez* (see page 499 *ante*). In that case, their Lordships held that there was no difference between *site* and *surface* as the Full Bench would seem to think. In this view, it may be maintained that cases of *encroachment* and *diluvion* by a river have been placed on the same footing. It is further worthy of notice that, in the Regulation the word *encroachment* has been used in connection with the cases of diluviation (see page 132 *ante*). In cases of *encroachment* by a river, it may be that the land is first encroached upon, that is, submerged and then washed away, but in cases of *diluvion*, the change by the action of the river refers to the washing away of firm land.

Original ownership continues during submergence after diluvion.

Just as in the case of *sudden encroachment* by a river or the sea, the ownership of the land encroached upon is not altered, (see page 133 *ante*) so in the case of diluviated land the original ownership continues. Whoever was the owner before would be presumed to be the owner during the period of submergence after diluvion. This view has been laid down in some cases which are to be briefly noticed here. The principle is evidently drawn from the view expressed by their Lordships of the Privy Council in *Lopez's* case, as was pointed out by Sir Richard Garth in the case of *Kally Charan Sahoo v. The Secretary of State* (1), where the learned Chief Justice observed as follows :—" It seems to me that the possession of the owner in such a case must be deemed to continue during the diluvion, and in fact until he is proved to have been dispossessed by some other person ; and I think that this view of the law is quite in accordance with *Lopez's* case (13 Moore's L. A. 467) and with the decision of the Privy Council in *Radha Prosad Singh v. Ram Charan Singh* (L. L. R.

(1) L. L. R. 6 Cal. 725 (730).

3 Cal. 796). We certainly acted upon that principle in this Court in deciding the important case of *Mohunt Kuttebhooj Bharto v. The Secretary of State for India* (Reg. Ap. No. 184 of 1877), which, I believe, is not reported, but against which, so far as I am aware, no appeal has been preferred."

"The plaintiffs in that case were shown to have been in possession of an estate in the year 1846, which soon afterwards became diluviated, and upon its re-appearance many years afterwards, it was taken possession of by the Government and resettled with other persons. We held, that, under such circumstances, the plaintiffs' possession must be considered as continuing during the period of diluvion, and until possession was shown to have been taken of the land by the Government." It may be noticed that the decision of the Calcutta High Court in this case on the point of limitation was overruled by the Privy Council, in the *Secretary of State v. Krishnamoni Gupta* (1).

The question of ownership of the submerged land after diluvion arose also in the case of *Mano Mohun Ghose v. Mothura Mohun Roy* (2), which was a suit for declaration of title to and recovery of possession of, alluvial lands, which had been diluviated more than twelve years before the institution of the suit. The plaintiffs proved their title and possession up to the time of diluviation, and alleged that the lands had reformed within twelve years without alleging or proving possession during that period. The defendants, on the other hand, alleged that the re-formation had taken place more than twelve years before the institution of the suit and that they had acquired a title to the lands by adverse possession for that period. In delivering the judgment in that case, Wilson, J. observed :—"A third proposition is also, I think, beyond dispute, that

Mano Mohun
v.
Mothura
Mohun.

(1) I. L. R. 29 Cal. 518.

(2) I. L. R. 7. Cal, 225.

where the true owner is in possession at the time of diluviation, his possession is presumed to continue so long as the land continues submerged probably also afterwards until he is dispossessed."

Mahomed Ali
v.
Khaja Abdul
Gunny.

While delivering the judgment of the Full Bench, in the case of *Mahomed Ali Khan v. Khaja Abdul Gunny* (1). Wilson, J. observed thus :—"Lands again may by natural causes be placed wholly out of reach of their owners, as in the case of diluvion by a river. In such a case, if the plaintiff shows his possession down to the time of diluvion, his possession is presumed to continue as long as the lands continue to be submerged."

Secretary of
State v.
Krishnamani.

In the case of the *Secretary of State for India v. Krishnamani Gupta* (2), their Lordships of the Judicial Committee have laid it down as a broad proposition of law, that no title to the submerged land can be acquired against the true owner, so long as it remains in that state. (See also *Udit Narain Singh v. Golabchand Sahu*, 1. L. R. 27 Cal. 221). This view was followed in the case of *Madhubi Sundary Dassya v. Gaganendra Nath Tagore* (3), where the Calcutta High Court (*per*. Geidt and Mitra JJ.) has laid down that during the period when a piece of land is submerged under water, the true owners must be held to be in constructive possession, and when it reappears and does not become fit for actual enjoyment in the usual modes, it may be presumed that the previous possession continue, until the contrary is proved.

Amrita
Sundari v.
Sirajuddin
Ahmed.

In the case of *Amrita Sundari Devi v. Sirajuddin Ahmed* (4), the High Court of Calcutta, following the above decision of the *Secretary of State v. Krishnamani Gupta*, held that the rightful owners must be deemed in

(1) 1. L. R. 9 Cal. 744 (751) : 12 Cal. L. R. 257

(2) 1. L. R. 29 Cal. 518 : 6 Cal. W. N. 617.

(3) 9 Cal. W. N. 111.

(4) 19 Cal. W. N. 565

law to have been in possession of the submerged lands during the periods of diluvion.

Diluvion, Sudden and Gradual:—Under this head, it is proposed to discuss whether there would be any difference in the application of the principle of law relating to the ownership of the submerged land by reason of the fact that land in some cases is diluviated suddenly and in others gradually. A difference, in fact, has been suggested between cases of sudden and gradual *encroachments* (see p. 137 *ante*). The view expressed there has been stated in consonance with the intention of the framers of the Regulation, as would be evident from the words—"without any gradual encroachment," used in Cl. II, Sec 4, (see pp. 345-346 *ante*). It has also been considered that the view expressed at p. 137 *ante* is consistent with what appears to be the law in England. There does not appear to be any doubt as to the point that in England a distinction is made between these two modes of submergence. In cases of *sudden* submergence, the ownership of the submerged land is not altered (see p. 133 *ante*); but in cases where submergence is effected by *gradual* and *imperceptible* encroachment of a river, the ownership is changed (see p. 137 *ante*). The latter view has been applied to a case in England even where the site has been found to be capable of being identified. [See *Foster v. Wright* (1)].

From the above state of the law prevailing in England it can be reasonably assumed that the law under the Regulation was understood to have been what was known to the framers of it, who were presumably English lawyers, until the decision in the case of *Lopez v. Maddan Mohan* (2) had been passed. In view of the unsettled state of the law this point has been left undetermined where the topic of "*Encroachment, Sudden or Gradual*" has been dealt with (see pp. 133-38 *ante*.) In

(1) 4 C. P. D. 438; 49 L. J. C. P. 97.

(2) 13 Moo. I. A. 467.

the case of *Srinath Ray v. Dinabandhu Sen* (1), their Lordships of the Judicial Committee have not laid down distinctly whether the original ownership of the land would be affected, if such land is encroached upon by the river gradually and imperceptibly, although they have said there, in distinct terms, that "sudden invasion of a private owner's land by the waters of a navigable river" would not deprive him of the ownership when the waters permanently retire. The point was, therefore, reserved for discussion under the head of "Diluvion, Sudden and Gradual" by which technical name *encroachment* by a river is understood in this country.

Diluvion
sudden.

In regard to land which is diluviated by the sudden change of a river, there does not appear to be any difficulty, as the law on this point is perfectly settled that there would be no change of ownership, if there be reasonable marks to continue notice of it or to prove its identity; (see pp. 133-34 *ante*). Land suddenly invaded by the waters of a river does not change ownership and when the waters retire permanently, it is restored to the original owner, (see pp 133-134 *ante*). Land suddenly submerged and dis-joined from one estate and joined to another estate will be restored to the original owner, if the identity is established (see under Avulsion 333-38 *ante*). So it may be taken as settled law that when diluviation is effected suddenly, the original ownership remains unaffected.

Diluvion
gradual.

As to diluviation which is effected gradually and imperceptibly, a difficulty arises only because of the law of England as pointed out above. According to the law of England, when riparian land is reduced to the condition of the river-bed by the gradual and imperceptible encroachment of a river, the Crown becomes the owner

(1) I. L. R. 42 Cal. 489.

of such submerged land by the converse application of the rule of alluvion (1). Now, the question is whether a similar rule would apply to a similar case in this country. The question of the ownership of the gradually diluviated land does not appear to have arisen in this country except in connection with the right of fishery in the waters upon the site of the diluviated land, or in relation to the right of property in the gradually diluviated land when it re-forms or re-appears. Cases relating to the question of the right of fishery in the water upon the site of the gradually diluviated land, would not be of any assistance in determining the ownership of the gradually diluviated land, as it has been held that fishery right in this country is not indissolubly connected with the ownership of the subjacent soil; [see *Srinath Roy v. Din Nath Sen* 2]. It, therefore, becomes necessary to consider the cases of reformation on the original site to determine whether any distinction has been made in the application of the rule underlying the law of reformation between cases where original diluviation has been effected suddenly and where the same process has been effected gradually.

Referring to the facts of the *Lopez's* case (3) which is the leading decision on the point, it will be found that the admitted facts so far as is necessary to quote for the present purpose, are as follows:—"It is admitted on both sides that the *mousah* in question was at one time situate on the north side of the defendant's *mousas* of Burraree, and it was gradually washed away by the River *Ganges*, the diluvion commencing in the year 1800-41. In the year 1848 land began to reform on the original site of the *mousah*, and the alluvion increased until it became a considerable tract." These words make it clear that the diluviation of the land in *Lopez's* case was gradually effected, and notwithstanding that it

(1) *Hull and Selby. Rail Co.*, 5 M. and W 327.

(2) 1 I. R. 42 Cal 489.

(3) 13 Moo. I. A. 467 (470).

was held that the original owner was entitled to the site and to the reformation on such site.

In the case of *Mano Mohun Ghose v. Mathura Mohun Roy* (1), where the possession of the true owner at the time of the diluviation was presumed to continue as long as the land continued submerged, the processes of diluviation and re-formation were found to be gradual.

Referring to the facts of the case of *Secretary of State v. Krishnamoni Gupta* (2), as stated in the judgment of Lord Davey, it would appear that submergence of lands in dispute took place from time to time, which evidently indicates that the diluviation was gradually effected in that case.

The decisions, cited above, prove that the previous owner is entitled to the land re-formed on the original site, irrespective of the question whether the original diluviation was *sudden* or *gradual*. From this, it follows that the right to the diluviated soil is not lost, however, gradual the process of diluviation may be. It can, therefore, be maintained that in this country, no distinction is made in the application of the law, whether the diluviation be sudden or gradual. This is a distinction which is made according to the law of England, and it does not appear to have been followed in this country. In this connection, reference may be to the case of *Narendra Chandra v. Nripendra Chandra Lahiri* (3). In that case, Ghose and Pargiter, JJ. after referring to the English cases (see p. 475 *ante*), where the distinction has been made, declined to follow them, as the principle which underlies the decision in *Lopez's* case clearly indicated that the owner of the soil continued to be owner of it, even though covered with water. That was, no doubt, a case of fishery, but the right of fishery in that case was considered as an incident and component

(1) I. L. R. 7. Cal. 225 (232).

(2) I. L. R. 29 Cal. 518.

(3) 4 Cal. L. J. 51 : 10 Cal. W. N. 540.

part of the ownership of the soil subjacent. The view expressed in that case by the learned Judges, was supported also by the application of the general principles of equity and justice as declared by Clause Fifth, Sec. 4 of Regulation XI of 1825. See also under "Without any Gradual Encroachment" pp. 340 46 *ante*.

Diluvion and Reduction of Rent and Revenue :—The rules of law prevailing in different provinces, whereby it is provided that the diminution of area is to be followed by reduction of rent and revenue, have been laid down by separate acts and enactments and they are briefly noticed below.

Government and private proprietors :—In Bengal, the Bengal Alluvion and Diluvion Act (IX of 1847) which deals with the assessment and measurement of land gained by alluvion or dereliction of a river or the sea, contains among others the following provision.

Sec. 5. "Whenever on inspection of any such new map it shall appear to the local revenue authorities that land has been washed away from or lost to any estate paying revenue directly to Government, they shall without loss of time make a deduction from the sadar jama of the said estate equal to so much of the whole sadar jama of the estate as bears to the whole the same proportion as the mufassal jama of the land lost bears to the mufassal jama of the whole estate; but if the mufassal jama of the whole estate or of the land lost can not be ascertained to the satisfaction of the local revenue-authorities, then the said local revenue authorities shall make a deduction from the sadar jama of the estate equal to so much of the whole sadar jama of the estate as bears to the whole the same proportion as the land lost bears to the whole estate. And this deduction, with the reasons thereof, shall be forthwith reported by the local revenue-authori-

Deduction from jama of estate from which lands have been washed away.

Proportionate deduction of suddar jama.

ties for the information and orders of the Board of Revenue, whose orders thereupon shall be final".

"*On inspection of any such new map*" :—The expression "*new maps*" in the above section means "*new maps*" referred to in Sec. 3 of Act IX of 1847, which are to be prepared according to the new survey which, it shall be lawful for the Government of Bengal to direct, of the lands on the banks of rivers and on the shores of the sea in order to ascertain the changes, whenever ten years shall have expired after the last previous survey. Such "*new maps*" can therefore be prepared only at the expiry of ten years from the last previous survey; and it is also apparent from the words of the above section that 'on inspection of such new map,' which evidently means 'on comparison of the new map with the old ones'—that such deduction of revenue can be made. From this it follows that a deduction of revenue can be made only at fixed periods, namely, at the expiry of ten years after the last survey.

No deduction
except at
decennial
re-surveys.

Suppose an estate is surveyed last in 1853, and a part of it diluviates in 1857, the landowner will not be entitled to a proportionate reduction of revenue until the year 1863, when a new survey will have to be made according to the terms of Sec. 3, Act IX of 1847.

This interpretation may be supported by the view expressed by their Lordships of the Judicial Committee in the case of *The Secretary of State v. Fakamiddannissa Begum* (1), in the following passage :—"If, indeed, such legislation as is contained in the preceding s. 5 had been in force from the outset, so that as soon as land had been washed away from a permanently-settled estate there had been a proportionate reduction of the revenue payable to the Government, it would not have been unreasonable to regard the land when again free from water as land 'added' to the estate, and to assess it

accordingly. And it may be that when the new map shows that land has been washed away from a settled estate since the previous survey, a proportionate abatement ought to be made under the Act of 1847. Upon this it is unnecessary to pronounce an opinion. It is clear that the Act provides no machinery for making such abatement where the land was covered with water at the time of the original survey. It is only 'when on inspection of the new map' it appears that land had been washed away that there is any legislative authority for making an abatement." From the above interpretation it follows that a proprietor will not be entitled to proportionate reduction of sadar jama at the very moment when his estate is diluviated as against the Government representing the sovereign authority; nor would the Government as such will be entitled to assess alluvial accretion except at the re-surveys contemplated by Sec. 3, of Act IX of 1847. See *Obhoy Churn Chowdhury v. The collector of Dacca* (1).

Government
representing
sovereign
authority.

"*Shall be final*" :—As to the significance of these words, reference may be made to the case of *Fahamidannisa Begum v. The Secretary of State* (2), which was affirmed by the Privy Council in *The Secretary of State v. Fahamidannissa* (3). See also "Suits under the Regulation" *post*.

Next, it may be maintained that there is nothing in Act IX of 1847, which precludes the Government from granting a reduction of rent or claiming an enhancement of revenue on account of alluvial accretions except at resurveys when the Government acts in the capacity of a private zemindari as in *khas mahals*. As to the point that the Government is in the position of a private zemindar in respect of *khas mahals*, it would seem to be settled law in the country. (See pp. 240 and

Government
as private
zemindar

(1) 4 Suth. W. R. 59 (civ).

(2) I. L. R. 14 Cal 67.

(3) See p. 548 *ante*.

242 *ante*). In such capacity it would be open to the Government to allow the abatement of rent except as laid down by the provisions of Act IX of 1847. This view would seem to follow from the decision of the Calcutta High Court, in his case of *Abhey Churn v. The Collector of Dacca* (1).

Act X of 1859.

Tenants with rights of occupancy.

Landlord and Tenant, Former law :—As between the landlord and tenant the question of deduction of rent will be governed by the provisions of the Law of Landlords and Tenants. The earliest enactment to which reference will be made here is the Act X of 1859, Sec. 18 of that Act runs as follows :—"Every *raiyat* having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise, or if the value of the produce or the productive powers of the land have been decreased by any cause beyond the power of the *raiyat*, or if the quantity of land held by the *raiyat* has been proved by measurement to be less than the quantity for which rent has been previously paid by him."

When *raiyat* may claim abatement of rent.

Act VIII of 1869.

Tenants with the right of occupancy.

Provisions exactly similar to the above section were declared by section 19 of Act VIII 1869. (The Law of Landlords and Tenants.)

According to the provisions of the former law, the right of an occupany *raiyat* to claim a deduction of rent on account of his land having decreased in area by diluvion was indisputable. But, by the terms of the *Kabuliyat* a tenant might have been precluded from claiming such abatement of rent, under the old law. This point was discussed by the Calcutta High Court, in the case of *Sheik Enayutollah v. Shuik Elakeebuksh* (2), where it was held that a tenant whether with or with-

(1) 4 *Suth. W. R.* 59 (Civ).

(2) *Suth. W. R.* 1864 (Gap no.) 42 (Act X Rulings).

out a right of occupancy was entitled to abatement of rent for land washed away, unless precluded by the terms of his Kabuliyat from claiming that abatement. Sir Barnes Peacock, C. J., in delivering the judgment of the Court in that case, with reference to the words—"raiyat having a right of occupancy" in the above section 18, observed as follows:—"Although section 18, Act X of 1859, is confined to raiyats having a right of occupancy, yet that Act was not intended to take away any right which existed by law, independently of the Regulations thereby repealed; and if, before the passing of the Act, a tenant, not having a right of occupancy, was entitled to abatement for any part of his land washed away, it was never intended by Act X of 1859 to take away that right. In England, it is clear that, if a portion of a tenant's land be washed away, he is entitled to have an abatement of his rent *pro tanto*. The rule is clearly laid down as follows in Bacon's Abridgment, 7th Edition, Vol. II, p. 63." After quoting that rule in the next passage of his judgment, the learned Chief Justice continued thus:—"We think that that rule is founded on the principle of natural justice and equity, that, if a landlord let his land at a certain rent to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant can not enjoy, the tenant is entitled to an abatement."

Tenants without a right of occupancy.

It would therefore seem to follow from the above passage in the judgment of Sir Barnes Peacock, that the right of a tenant to an abatement of rent on account of the diluviation of his land, is a right founded upon the general principles of equity and justice. See also *Raghunath Mondul v. Jagatbundhu* (1), and *Sham Lall v. Hady Bunjara* (2). An auction-purchaser of a holding was also held to be entitled to claim abate-

(1) 8 Cal. L. R. 393.

(2) 2 Hany's Rep 522.

ment of rent when the area was diminished by diluvion although his purchaser may have neglected to make such claim; *Kaliprasanno Rai v. Dhananjay Ghose* (1). But in a case of a private sale it was held that the purchaser was not entitled to enforce the claim of abatement, as his vendor did not claim the right at the time fixed by the agreement between him and the landlord: *Prosunno Moyee v. Doya Moyee* (2).

Talookdars,
howladars,
putnidars,
Darputnidars,
etc.

As to *talookdars*, *howladars*, *putnidars*, *darputnidars* and other tenure-holders, it would seem to be clear that under the former law, it was open to them to claim the right to abatement of rent, when the whole or portion of the land owned by them had been washed away. In *Afsuruddin v. Shashibala* (3), it was held that in the absence of an express stipulation to the contrary, a *talookdar* was entitled to claim a reduction of rent, when his land had been washed away. In the case of *Horo Kishen v. Foykishen* (4), it was held by a Full Bench of the Calcutta High Court that a *putnidar* or any other lease-holder could sue for abatement of rent under Sec. 23 of Act X of 1859.

In the case of *Ishan Chunder v. Chunder Kant* (5), the original tenure-holder having agreed not to claim abatement of rent, a purchaser of his right at an auction-sale was held bound by the original contract, although a portion of the land was diluviated.

There appears to have been some doubt as to the right of a *talukdar* created before the permanent settlement to claim abatement of rent under the former law: *Ram Churn Bysack v. Lucas* (6).

Landlord and tenant, present law.

Since the passing of the Bengal Tenancy Act (VIII of 1885), all the previous enactments have been repealed

Act VIII of
1885.

(1) I. L. R. 11 Cal. 625.

(3) Marshal's Rep. 558.

(5) 13 Cal. L. R. 55.

(2) 22 Suth. W. R. 275.

(4) 1 Suth. W. R. 299.

(6) 16 Suth. W. R. 279 (Civ).

in those parts of Bengal, Behar and Orissa, where the application of that Act has been extended. In such parts, the cases relating to the reduction of rent on the ground of the decrease of area by diluvion will be governed by the provisions of Sec. 52, sub-section (1), cl. (b), which runs as follows :—

52. (1) "Every tenant shall—"

.....

"(b) be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area."

The word "tenant" has been defined by Sec. 4 of that Act, which includes tenure-holders, under-tenure-holders, raiyats and under-raiyats.

Thus, the distinction between tenure-holders and raiyats which prevailed under the former law with reference to their right to claim abatement of rent when the area of their holding is diminished by diluvion, has been removed. Under the present law, a raiyat cannot be deprived of his right to claim abatement under Sec. 52 of the Bengal Tenancy Act, even if there be a contract to the contrary : Sec. 178, cl. (f). In this respect, the present law differs from the former law, according to which an express stipulation could have deprived a tenant of his right to claim abatement of rent. But, in the case of tenure-holders, an express agreement not to claim abatement debars him from claiming a deduction of rent on the ground of diminution of area by diluvion. Section 179 of the Bengal Tenancy Act makes such agreement valid. In the case of *Nunda Lal Mukherji*

v. Kymuddin Sardar (1), the lease was a permanent mokurari one, in which it was stipulated that the tenant would not be able to claim abatement of rent for diminution of area by diluvion. It was held that on account of diluvion the tenant was not entitled to claim an abatement of rent under Sec. 52.

The word "tenant" in the above section does not include a raiyat who holds *dearah* land as contemplated by the provision of Section 180 of the Bengal Tenancy Act, so as to be able to claim a reduction of rent according to the provision of Sec. 52. This point has been decided in the case of *Sunibush Proshad v. Ram Raj Tewari* (2), where it has been held that a raiyat who holds *dearah* land can not, until he has acquired occupancy right in his holding by twelve years continuous possession, demand a reduction of rent under cl. (b) of sub section (1) of section 52 of the Bengal Tenancy Act.

In the North-
Western
Provinces.

The rules for reduction of revenue in respect of mahals diminished by diluvion has been provided for by Sec. 99, cl. (2) of the North-Western Provinces and Oudh Land Revenue Act, 1901 (Being Act III of 1901, United Provinces). See page 303 *ante*.

As for reduction of rent on account of the diminution of area of a tenant, provisions have been made under Chapter IV of the North-Western Provinces Tenancy Act, 1901 (Agra Tenancy being Act II of 1901, United Provinces). By cl. (e), section 42, it has been laid down that an *ex proprietary* tenants may sue for abatement of rent when his holding has been decreased by diluvion or by encroachment. Clause (g), Sec. 43 lays down a similar provision for abatement of rent in respect of the holding of an occupancy tenant. A similar right has been given to non-occupancy tenants by Clause (a), Sec. 43. See pp. 320-321 *ante*.

(1) 9 Cal. W. N. 886.

(2) 18 Cal. W. N. 598.

In the Punjab, the provision for deduction of revenue has been made by section 59, cl. (e) of the Punjab Land Revenue Act (XVII of 1887): see page 303 *ante*. The cases relating to the deduction of rent on account of the deficiency of area caused by the action of a river will be governed by Sec. 28 of the Punjab Tenancy Act (Act XVI of 1887). The substantive provision has been laid down by sub-section 1), clause (b) of Sec. 28, which runs thus :—

In the
Punjab.

“28(1) Every tenant shall—”

* * *

(b) “be entitled to an abatement of rent in respect of any deficiency proved to exist in the area of his tenancy as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenancy by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area.”

The provision thus made by the Punjab Tenancy Act, 1887 would appear to be similar to the law, laid down by the Bengal Tenancy Act (see pp. 319-320 *ante*.)

Miscellaneous cases where cl. V, Sec 4, has been applied :—

The two principal classes of cases, namely, those relating to reformation in *situ* and those of diluviation, for which no specific provision has been made by the Regulation, and which have been, for that reason, decided upon “general principles of equity and justice,” have been discussed. It is now proposed to discuss only few other decided cases where, in the absence of any specific provision in the Regulation, the general principles of equity and justice have been applied.

In the case of *Rajendra Nath Ray v. Nando Lal*

Alluvial
increment to
rent-free
tenure.

Guha (1), the point that was raised was, whether an alluvial accretion to a rent-free *Mahatran* was liable to be assessed with rent according to the principle of law involved in the express enactment of S. 52 of the Bengal Tenancy Act (VIII of 1885). In that case, it has been held (*per* Mookerjee and Beachcroft, JJ) that Sec. 52 of the Bengal Tenancy Act is not directly applicable to such a case, and that the alluvial increment to a rent free tenure is liable to be assessed with rent according to the general principles of equity and justice, by which such cases are to be decided (see pp. 323-325 *ante*).

It may be observed in this connection that it was held by the Sudder Court, in the case of *Musst. Rammonee v. Oomesh Chunder* (2), that such right was left to Zemindars by the proviso to clause first, sec. 3 of Regulation II of 1819, in cases where the increment did not exceed 100 Bighas (see pp. 322-323 *ante*).

Fishery in
private
streams.

In *Narendra Chandra Lahiri v. Nripendra Chandra Lahiri* (3), a non tidal and non-navigable river which formerly flowed through the estate of A, by gradual and imperceptible encroachment, submerged a portion of an adjoining estate of B. A claimed a right of fishery over that portion of B's state which was then submerged by the river. It was held in that case that upon general principles of equity and justice as declared by Cl. V., Sec. 4, A did not acquire any such right. Thus, in a case where the right of fishery was in dispute, it was held by the Calcutta High Court (*per* Ghose and Pargiter, JJ.) that the Courts of Justice would be guided by the general principles of equity and justice, (see pp. 474-75 *ante*).

Now, the above two decisions illustrate how Clause Fifth, Sec. 4, has been construed by our Judiciary.

(1) 19 Cal. L. J. 595 : 18 Cal. W. N. 1206.

(2) (1858) Beng. S. D. R., 1836.

(3) 4 Cal. L. J. 51 : 10 Cal. W. N. 540.

In the case of *Kalee Pershad v. Collector of Mymensingh* (1), where the contest was between two private proprietors for the possession of an island to which Government did not lay any claim, it was held that if the Government did not think fit to lay claim to it, the case would fall within the 5th Clause of Section 4, (see p. 402 *ante*).

“Best evidence * * * * * of established local usage”:—This point has been dealt with at some length under the head of “clear and definite usage,” (see pp. 190—195 *ante*). What would, and would not, constitute the best evidence of local usage, has been discussed in that part in reference to reported easements, where the point has been dealt with.

Cases where Cl. V, Sec. 4 has not been applied:—

In the case of *Ranee Surnomoyee v. Fardine Skinner & Co.* (2), the plaintiff claimed a part of the river-bed between an island and the main land, as forming an accretion to the island which was a khas mahal purchased by her at the sale by the Collector. That part of the river-bed gradually dried up in consequence of the channel between the island and the main land, having become closed at both of its ends. It was held by the Privy Council that in such cases the dried-up bed could not be regarded as land gained by gradual accession from the recess of the river. In this case, it was contended on behalf of the appellant that, upon the general principles of equity and justice, according to the provision of Cl. V, Sec. 4, she was entitled to it. Upon this contention, their Lordships held that Cl. V, Sec. 4 was not applicable to the facts of the case, as the land in dispute was not gained by alluvion or dereliction of a river within the meaning of that clause.

(1) 13 *Suth. W. R.* 366 (370) i

(2) 20 *Suth. W. R.* 276 (Civ)

ALLUVION AND DILUVION.

RELATING TO SUITS RESPECTING ALLUVIAL LANDS.

Suits relating to the liability to assessment of Revenue in respect of Alluvial Land :—

Right to
contest
liability to
assessment of
revenue in
Civil Courts
expressly
given by
Reg. II of
1819

Under this head, the right of private proprietors to contest their liability to assessment of revenue by the Government in a Civil Court is to be discussed. The regulations and enactments which have been passed to deal with the question of assessment of revenue upon alluvial increments have been stated before in connection with "Assessment of Revenue on Accretions," (see pp. 288-292 *ante*). It would be apparent on reading those pages that Regulation II of 1819 [Bengal Land-Revenue Assessment (Resumed Lands) Reg. 1819] lays down the *substantive* provision of law on the subject. That Regulation, by Cl. 3, Sec. 21, declares that the order of the Board of Revenue pronouncing against the liability to assessment shall be considered final, unless fraud or collusion in the previous inquiry can be established in a Court of Justice. Sec. 22 of Regulation II of 1819 provides that a party may be left in possession of the land which the Revenue Authorities consider liable to assessment, whenever he shall engage to institute a suit in a Court to try the justness of the demand made by the Revenue-Authorities. Additional right to contest liability to assessment by civil suits has been given to proprietors by further provision made by Sec. 24 within the limited time, prescribed by that section. Sec. 26 of that Regulation further lays down that against the decision in cases instituted in the Zillah Court, there would be a right of appeal to the court of *Sudder Dewany Adalat*. Sec. 31, Reg. II of 1819 lastly asserts in general terms that "it being left to the Court of Judi-

cature to decide on all contested cases whether lands assessed under the provisions of this Regulation were included at the period of the decennial settlement within the limits of the estates for which a settlement has been concluded in perpetuity, and to reverse the decision of the Revenue-authorities in any case in which it shall appear that lands which actually formed, at the period in question, a component part of such an estate, have been unjustly subjected to assessment under the provisions of this Regulation, the Zamindars and other proprietors of land will be enabled, by an application to the Courts, to obtain immediate redress in any case in which the Revenue-authorities shall violate or encroach on the rights secured to them by the Permanent Settlement."

It would thus appear clear that the right to contest the liability to be assessed with revenue in respect of any land included within the boundaries of any permanently settled estate was expressly given to zemindars and other proprietors of land by Regulation II of 1819.

The next Regulation to which reference should be made in this connection is Regulation VII of 1822 (Bengal Land Revenue Settlement Regulation, 1822). This Regulation applied at first to the ceded and conquered Provinces in the district of Cuttack, pargana Pataspur, and its dependencies where the permanent settlement has not been introduced and was afterwards extended to the Provinces of the Bengal Presidency to be applied to various mahals and tracts for which a permanent settlement had not been concluded, by the provision of Sec. 1 of Regulation IX of 1825 (Bengal Land-Revenue Settlement Regulation, 1825). Although Regulation VII of 1822 deals with estates or mahals not permanently settled and gives power to the Collector to deal with questions of title in a variety of matters,

Right to
contest
Collector's
decision in
Civil Courts
expressly
given by Reg.
VII of 1822.

yet in such cases it makes provision for resort to Civil Courts, to contest the decision of the Collector.

The right to bring a regular suit in the Zillah Court to contest the decision of the Collector relating to the existence of any *usage* of *partition* has been expressly given by proviso II, clause second of sec. 12 of that Regulation. There, it has been also provided that in certain cases the decision of the Revenue-Officers shall be conclusive. Sec. 18 declares that the Courts of Judicature shall not disturb possession given by the Collector, except on a regular suit and on a decision as to the right. Sec. 23, Cl. (2) lays down that regular suits which may be brought to contest decisions passed by the Collector shall be of the nature of an appeal to the Court in its regular jurisdiction from a summary award. It shall not therefore be necessary for the Collector or other officer of Government to be a party in the action. By the sixth clause of sec. 29, Reg. VII of 1822, the right to bring a regular suit to contest the decision of the Board of Revenue has been distinctly given in the following words:—"Any person, however, dissatisfied with the summary judgment of the Collector or the Board, and desirous of a full and formal decision, shall be at liberty to prefer a regular suit to try the merits of the case in the Zilla or other similar or superior Court in which it may be cognizable."

Reg. IX of 1825 has not changed the substantive law.

By Regulation IX of 1825 (Bengal Land-Revenue Settlement Regulation, 1825) rules of procedure laid down in Reg. II of 1819 have been modified but the substantive law declared by Reg. II of 1819 remains unchanged. Reg. IX of 1825 by a proviso to Clause Twelfth, Sec. 5, lays down additional rules for instituting suits in Civil Courts.

The Regulation that should be referred to next is Regulation III of 1828. By this Regulation, Special Commissioners were appointed in some districts for a speedy determination of suits brought to contest the

demand of Revenue-Officers. In those districts where Special Commissioners were appointed the powers of the ordinary civil courts in such cases were suspended and no appeal lay to them from the decisions of Collectors or the Board of Revenue. All these provisions were, however, repealed by Act I of 1903. Sec. 10, clause second of that Regulation, which has not been repealed, provides that all decisions by the Boards of Revenue relating to the liability of assessment of lands shall be carried into immediate execution, notwithstanding that the parties against whom such decision may have been passed, shall have instituted a suit to contest the decision of the Board in any of the established Courts of Justice. Clause Third of Sec. 10, further lays down that all suits which may be instituted in the established Courts of Justice under the provisions of sections 22 and 24, Reg II of 1819, and Sec. 5 of Reg. IX of 1825 to contest the decisions of the Board of Revenue shall be heard and determined as being in the nature of appeals from those decisions. That clause further provides rules as to when further evidence oral and documentary should be and should not be taken. By clause fourth of that section, the right has been reserved for the Revenue-authorities to prefer an appeal in those cases to the Court of Sadar Dewani Adalat from the decision passed in the first instance by Zillah courts. Lastly, by a proviso to Sec. 13, that Regulation lays down that suits brought by Zemindars, Talukdars and other Sadar Malguzars, owning and occupying land in the neighbourhood of the Sundarbans with a view to contest the right of the Government to make grants, leases, and assignments in respect of lands which may be proved to be within the limits of the unoccupied jungle, shall be dismissed with costs. [See. *Rajah Barodhant Roy v. Commissioner of the Sundarbans* (1)]

Reg. III of 1828 keeps alive the right to contest the decision of the Board in Civil Courts.

(1) 2 Beng. L. R. (P. C.) 33 : 115uth W. R. (P. C.) 14

It is thus apparent that modifications made by the provisions of Regulation III of 1828 relate only to the rules of the procedure and they do not touch the right of appeal to civil tribunals of the country nor alter any of the rights previously assured to the owners of permanently-settled estates.

The above review of the law which existed in this country prior to the passing of Act IX of 1847 (Bengal Alluvion and Diluvion Act, 1847) discloses the fact that although successive Regulations had been passed after the Permanent Settlement of Bengal (Regulation I of 1793), they were only intended to bring under assessment lands not included in permanently settled estates and lands which were waste or lands gained by alluvion or dereliction of a river or the sea, comprised within permanently settled estates which were rigorously excluded from further assessment. It would also be apparent from the above review that the proprietors were also assured that they would be able to protect themselves by suits in Civil Courts when the revenue authorities act in a way which may prejudice their permanent right

Act. IX of 1847 was construed for sometime as having abrogated the right to contest the liability to assessment of land gained by alluvion or dereliction.

Now, turning to Act IX of 1847, whereby the previous Regulations regarding the liability to assessment of land gained by alluvion or dereliction was repealed, it would be found that Sec. 6 lays down that assessment made by local revenue authorities and confirmed by the Board of Revenue shall be considered final. Sec. 9 of that Act further provides that no suit or action in any Court of Justice shall lie against the Government or any of its officer on account of anything done in good faith in the exercise of the powers conferred by that Act.

By reason of the above provisions in Act IX of 1847, that Act was construed for sometime as having abrogated the right of a proprietor to contest the liability to

assessment of lands which reformed on an original site of ascertainable boundaries, by suits in civil courts. This will be apparent from the first two cases briefly noticed below.

In the case of *Dewan Ramjewan Singh v. The Collector of Shahabad* (1), it was held that land, which upon inspection of the Survey Map appeared to have been added to an estate, although it might be a re-formation upon the old site, was liable to assessment under section 6, Act IX of 1847, and no suit would lie in a civil court against the orders of the Board of Revenue in such a matter. Sir Richard Couch, while delivering the judgment of the Court in that case, said thus :—"The decision of the Privy Council is a decision with regard to the property in the land which is so reformed, that is, where the land which was formerly lost to the proprietor by being washed away or submerged, is reformed upon the old site and the boundaries can be traced; the land so reformed belongs to him. But that decision does not touch the construction of this Act..... .."

"It appears to us that this is a case coming within section 6, where power is given to assess the land which had been re-formed, and then the same section says expressly that orders of the Sudder Board of Revenue shall be final in such a matter. If the present plaintiff had any case at all, it was one for the consideration of the Sudder Board of Revenue and not for a suit in a Civil Court." This view was followed in *Ram Jewan Singh v. The Collector of Shahabad* (2), where it was held (*per* Couch, C. J., and Phear & Ainslie, J. J.) that the words—"land has been added to any estate paying revenue directly to Government," in Sec. 6, Act IX of 1847, mean "added to the estate as it is depicted on the survey map."

(1) 14 Beng L. R. 221 (Note): 18 Suth. W. R. 64 (Civ.).

(2) 19 Suth. W. R. 127.

Suits maintainable to recover property assessed under sec. 6.

The view expressed in the above two cases was modified in the case of *The Collector of Moorshedabad v. Ray Dhunput Singh* (1). In that case, a piece of land was gained from the river Ganges, and was supposed to be an addition to a Zemindari by the Survey Authorities, and as such it was settled with the Zemindar with an additional jumma having been assessed upon it. It was held that so far as the addition was concerned, the orders of the revenue authorities were final under section 6 of Act IX of 1847 as regards the person whom they directly affect, namely, the zemindar, but those orders did not operate to take away the right of the proprietor from whom the land was gained to seek by suit in a Civil Court to recover his property from the hands of those who were keeping it from him. It was further held in that case that the words of section 9 of Act IX of 1847 would bar a suit against Government or its officers for damages on account of anything done in good faith in the exercise of the powers conferred by that Act, but they did not forbid a suit to recover property which either Government or its officers may be keeping away from its rightful owner. This decision was followed in *Narain Chander v. Taylor and others* (2), where it was held that although a settlement made by the revenue authorities under Act IX of 1847 was final, the fact of such settlement would not preclude a proprietor from establishing his right to the lands so settled.

Suits maintainable to contest whether revenue authorities have jurisdiction to act under sec. 6.

The next case where the point was raised is the case of *Sarat Sundari Debi v. Secretary of State* (3). In that case a distinction has been made between a suit which is brought to contest the amount of revenue assessed upon lands in dispute and a suit which is

(1) 23 Suth. W. R. 38; 15 Beng. L. R. 49.

(2) 1 L. R. 4 Cal. 103; 3 Cal. L. R. 151.

(3) 1 L. R. 11 Cal. 784.

instituted to contest the right of the revenue authorities to assess those lands with any additional revenue ; and it was held that the assessment in the former case was final and could not be called in question in a civil suit, but that fact would not bar a suit in the latter case, which would raise a question of jurisdiction, namely, whether the revenue authorities had jurisdiction in such cases to act under the provision of Sec. 6, Act IX of 1847. This view is supported by the following passage in the judgment :—"We think, therefore, that the words of the Act and the reported cases go to this extent, that when an assessment has been made under Sec. 6 of the Act and approved by the Board of Revenue, that assessment is final and can not be called in question in a civil suit. But the fact of an assessment having been made is no bar to an inquiry as to whether the Act applied, and whether the revenue authorities had any right to make the assessment—in others words, whether they had jurisdiction under Sec. 6 of the Act. That is a question which we think it is open to the Courts to try, and that is precisely the question raised in the present suit "

The difference of opinion, as indicated above by the conflicting decisions, induced Field & Macpherson, JJ. to refer the point to a Full Bench, in the case of *Fakamidanissa Begum v. Secretary of State* (1), with an expression of opinion that Act IX of 1847 was a Procedure Act and not intended to interfere with the substantive right reserved for proprietors by the previous Regulations as pointed out by Sir Richard Couch in *Budrunnissa Chowdhurani v. Prosunno Kumar* (2). The facts in *Fakamidanissa's* case were shortly as follows :—The lands to which the suit related were a part of Chur Mohan Sureswar, and were included with-

Conflict of opinion set at rest by a Full Bench decision in *Fakamidanissa v. Secretary of State*.

(1) I.L.R. 14 Cal. 67.

(2) 6 Beng. L. R. 255 : 14 Suth. W. R. 25 (F. B.)

in a permanently-settled estate of the plaintiffs. At the time when the first survey map was made, the whole chur had become diluviated; when a second survey map was made under Act IX of 1847, the part of the chur now in question had re-formed on the old site. The Revenue Authorities assessed the land with revenue under Act IX of 1847. The suit was brought to establish the plaintiff's right to hold the land as part of their permanently-settled estate, free from liability to additional assessment as had been imposed upon it. The primary Court gave the plaintiff a decree, but the Lower Appellate Court reversed it. Against the decree of reversal a second appeal was preferred to the High Court, which gave rise to the reference to the Full Bench.

The questions referred to the Full Bench were the following :—

First—Whether the provisions of Act IX of 1847 are applicable to land reformed on the site of a permanently-settled estate, the revenue of which has been paid without abatement since the permanent settlement.

Secondly—Whether, if these provisions are not so applicable, a Civil Court should, in the exercise of its discretion, make a decree declaring that the proceedings of the revenue authorities in respect of such land are *ultra vires*.

The judgment of the Full-Bench in the above case was delivered by Wilson, J, who after reviewing the earlier Regulations, as has been done in this book (see pp. 558-62 *ante*), concluded thus (at p. 86):—"These are the sections which have to be considered, and the broad questions to be decided are, first, whether they have taken away from the Civil Courts all power of inquiring into the liability to assessment of alluvial lands which have been assessed; and, secondly, whether they have made lands

liable to be assessed which were not so before. I think it worthy of observation, in the first place, that the Legislature of this country has always acted in these matters upon a clear policy, namely, that questions of title are for the Courts of Justice, questions of assessment for the Revenue Authorities. That principle had, prior to 1847, been acted upon for 50 years in the case of alluvial lands, and it is still applied, so far as I know, in all other cases. The construction contended for reverses the settled policy in this one particular instance ; it involves a direct infringement of rights of property amounting in the present case, on the facts found, to confiscation ; and it takes away from people their ordinary power of having their legal rights of property determined by Courts of Justice. I think we ought not to adopt such a construction, unless the intention of the Legislature has been expressed in clear and unmistakable language, and I can find no clear expression of such an intention, on the contrary, I think the language of the Act shows with reasonable clearness another intention altogether." The learned Judge, next, discussed all the provisions of Act IX of 1847, and, then, came to a conclusion which was expressed in the following terms ;—"The general conclusion I have arrived at on the examination of this Act is, that the Legislature has abolished all the special provisions for trying the liability to assessment in the case of alluvial lands, has cast it upon the Revenue Authorities to form and act on the best judgment they can in the matter, and has left the question of liability to be decided by the Civil Courts as and when the question may arise. No doubt the Revenue Authorities are right in making the careful inquiries which I understand they do make before assessing such lands ; I think, however, that their conclusions are not of binding force, but that the Civil Courts have, in a suit like

the present, jurisdiction to inquire into the question of liability." (1).

Thus by the Full Bench the first question was answered in the negative and the second question in the affirmative.

The above view affirmed by the Privy Council in appeal.

Secretary of State v. Fahamidannissa.

The decision of the Full Bench was afterwards affirmed on appeal to the Privy Council, in the case of *Secretary of State v. Fahamidannissa Begum* (2); Lord Herschell, who delivered the judgment of their Lordships, in the concluding portion, said thus :—“ The case, as it appears to their Lordships, may be shortly put thus. The Board of Revenue have, in violation of the right solemnly secured to the owner of a permanently-settled estate, claimed to subject his land to an additional assessment, a claim which has been declared by legislation to be wholly illegal and invalid. Thereupon the owner exercises the right conferred upon him by the Regulation of 1819, and appeals by suit to the Court of Judicature to reverse the decision of the revenue authorities. In bar of this suit the answer set up is that a subsequent law empowers the revenue authorities to assess, by new machinery lands of a description within which the land in question does not fall, and makes the orders of the Board of Revenue thereupon final. Their Lordships are at a loss to see how this can be any answer. If it had been intended to take away from the proprietors of estates the power, by application to the Courts, to obtain immediate redress in any case in which ‘the revenue authorities shall violate or encroach on the rights secured to them by the permanent settlement,’ it would have been done in express terms and not by such enactments as are contained in the Act of 1847. It seems to their Lordships that it would be an erroneous interpretation of that

(1) *Fahamidannissa v. Secretary of State*, 1 L. R. 14 Cal. 67 (90).

(2) 1 L. R. 17 Cal 590 (605); L. R. 17 Ind. A. 40 (53.)

statute to hold that it rendered the Board of Revenue, supreme, and enabled them to make valid and effectual a proceeding on their part which the law had declared to be wholly illegal and invalid."

The above decision, namely, that Act IX of 1847 has no application to lands included in the Permanent Settlement of 1793, when the assessment of such lands was fixed for ever, and that when such lands reform after diluviation, they cannot be re-assessed, has been re-affirmed by the Privy Council, in the case of *Jagadindra Nath Roy v Secretary of State* (1).

The cases, discussed above, relate to the liability to assessment of reformed lands which were comprised within the boundaries of permanently-settled estates. The law on this point is now settled that, if any re-assessment is made of land forming part of a permanently-settled estate, when it reforms after diluviation, a suit can be maintained in Civil Courts for a declaration that such land is not re-assessable by the Revenue Authorities under the provisions of Act IX of 1847, if there has not been any reduction of revenue under section 5 of the Act. Another proposition of law that would seem to follow from the decision of the Privy Council in *Fahamiddamissa's* case (2) is that, where there shall be any deduction from revenue according to the provision of Sec. 5 of Act IX of 1847, on account of the reduction of area by diluviation, and if the submerged land re-forms afterwards, such land will be considered as land "added to any estate paying revenue" within the meaning of Sec. 6, and that no suit would lie to contest the liability of such land to be re-assessed. But this question, as a matter of fact, has been left undetermined by their Lordships of the Judicial Committee, as would appear from the following passage in the judgment:—"If, indeed such legislation, as is contained in the preceding Sec. 5

Civil suits would seem to be not maintainable when submerged land reappears after reduction of revenue.

(1) 1 L. R. 30 Cal. 291.

(2) 1 L. R. 17 Cal. 590.

had been in force from the outset, so that as soon as land has been washed away from a permanently-settled estate there had been a proportionate reduction of revenue payable to the Government, it would not have been unreasonable to regard the land when again free from water as land 'added' to the estate, and to assess it accordingly. And it may be when the new map shows that land has been washed away from a settled estate since the previous survey, a proportionate abatement ought to be made under the Act of 1847. Upon this it is unnecessary to pronounce an opinion." (1).

Suits relating to illegal Assessment :—Suits relating to the liability to assessment of reformed lands which were comprised within the limits of estates at the period of the decennial settlement and subsequently permanently settled by Regulation I of 1793, have been discussed so long. It may be observed now that no such question can possibly arise in respect of lands which were not included within an estate at the Permanent Settlement; for lands other than those which were not included within estates permanently settled, are lands known as Khas Mahals which are the property of the State. In such cases, a reduction of Sadar Jama can be made at any time, 'see pp. 549-50 *ante*') when land is washed away by the action of a river, so that land re-forming after diluviation becomes land added to an estate within the meaning of Section 6 of Act IX, 1847. Consequently the order of the Board of Revenue shall be final in such cases. (See p. 569 *ante*.) Again, if there be not any deduction from Sadar Jama on account of a reduction of area by the action of a river, the case may come within the general rule relating to re-formed lands as stated above.

The point that, next, arises for consideration relates to the assessment of land which, though included at the

Of lands
within Khas
Mahals.

(1) *Secretary of State v. Fahamiddinissa*, I I. R. 17 Cal. 590 (603).

period of the Permanent Settlement within the limits of taluks held by individuals under special *pattas* from the Collector, such as the *Patitabadi* and *Jungalburi* taluks in the district of 24-Parganas and Jessore, may not have been permanently assessed at the Permanent Settlement, as contemplated by Clause Third, Sec. 3 of Regulation II of 1819.

Assessment of alluvial lands within taluks such as *Patitabadi* and *Jungalburi* under Cl. 3, S. 3, of Reg. II of 1819.

The proviso to that clause says—"Provided, however, that in respect to such lands, if in the possession of the original patta-holder, or his legal representative, the conditions of the patta in regard to the assessment of the land included within the limits specified in that instrument shall be strictly maintained."

Now, the question is whether a suit is maintainable in Civil Courts to contest the rate of assessment of lands added to such Taluk by alluvial increments, when the rate adopted by the revenue authorities is in excess of the stipulation of the above *patta*.

Whether a suit lies when the assessment is contrary to the conditions of the *Patta*.

The answer to the above question will depend upon the construction of the position of the Government in respect of Khas Mahals, such as the Sundarbans, and others which have been declared to be the property of the State by Section 13 of Regulation III of 1828. The position of the Government in this country with reference to those lands is that of a private zemindar. This view can be maintained by the decisions in the cases of *Obhay Churn v. Collector of Dacca* (1), *Musst Tabira v. The Government* (2), and *Collector of Pabua v. Ranee Surnomoyee* (3); see also *Musst Idan v. Nando Kishore* (4), *Ananda Hari v. Secretary of State* (5) and *Secretary of State v. Krishnamani Gupta* (6). In the first two cases, a clear distinction has been pointed out between

Government is a private zemindar in Khas Mahals.

(1) 4 Suth. W. R. 59.

(2) 6 Suth. W. R. 123, affirmed on review in 7 Suth. W. R. 513.

(3) 17 Suth. W. R. 163.

(4) 25 Suth. W. R. 390.

(5) 3 Cal. L. J. 316.

(6) I. L. R. 29 Cal. 518.

the acts of the Government in exercise of its sovereign right, and in the capacity of a zemindar.

Thus, in respect of the lands belonging to the State, the Government being in the position of a private zemindar, the Civil Court may be held to have every right to declare that the assessment made by its officers, contrary to the provisions of the *Potta*, by which rights were solemnly secured to the Talukdars, as contemplated by Cl. 3, Sec. 3 of Regulation II of 1819, is illegal. It has been discussed before that the right to have recourse to Civil Courts was expressly given by the Regulations passed anterior to Act. IX of 1847. (See pp. 558-62 *ante*) Now, the only question is, whether any such right has been abrogated by Act IX of 1847 and Act XXXI of 1858 (Bengal Alluvial Land Settlement Act, 1858), which lay down the law for assessing revenue upon alluvial increments to *Patitabadi* or *Jungal-buri* Mahals held under special *pattas* from the Collector.

In regard to Act IX of 1847, it may be maintained that the principle which is involved in the decision of *Secretary of State v. Fahamidaumisa Begum* (1), can be well applied to a case where revenue is assessed upon land gained by alluvion to a *Patitabadi* or *Jungal-buri* Taluk, contrary to the terms of the special *Potta*. The view expressed by their Lordships of the Judicial Committee in that case, in the concluding portion of their judgment (see pp. 568-569 *ante*), would seem to be applicable to such a case.

With reference to Act XXXI of 1858, it may be said that the last paragraph of Section 2 of that Act runs thus:—"The provisions of the said Regulation, (Reg. VII of 1822) so far as the same may be applicable, are hereby declared to extend to all settlements made under this Act." It has been discussed before (see pp. 559-60 *ante*) that Regulation VII of 1822 expressly

(1) I L R. 17 Cal. 590.

reserves the right in favour of a private proprietor to prefer a regular suit, whenever he is dissatisfied with the summary judgment of the Collector or the Board of Revenue.

In consideration of the arguments urged above it would seem reasonable to hold that a suit would lie to the Civil Court, when assessment is made by the Revenue Authorities in excess of the stipulation contained in the "special *potta*" referred to in the above case.

Different kinds of cases, relating to reformations, where Government is interested :—In discussing the topic relating to "Suits to contest the liability to Assessment," (1) only the cases of re-formations *in situ* have been dealt with. Ordinarily cases of reformations fall under three heads, namely, (1) those in which the Government resume the land reformed on an old site, comprised within a permanently-settled estate, (2) those in which such lands are resumed, and settled with the old proprietor on condition of paying newly assessed revenue, and (3) those in which such lands after the imposition of new revenue are settled with a third party. As to the *first* head, reference may be made to such cases as those of *The Collector of Dacca v. Kallee Charan Poddar* (2) and *Rani Hamanta Kumari v. Secretary of State* (3). In such cases, suits instituted against the Government are suits for recovery of property taken possession of by Government, and so they are covered by the general provision of the law. With regard to the *second* head, mention may be made of the cases of *The Collector of Rajshahye v. Rani Shama Sundari* (4) and *Sarat Sundari v. Secretary of State* (5). In those cases, reformed lands after resumption were settled with the original proprietors, for a term of years. By

Reformed land when resumed and retained by Government, suits under general law.

(1) See pp. 558-569.

(2) 21 Suth. W. R. 446.

(3) 3 Cal. L. J. 560.

(4) 22 Suth W. R. 324.

(5) 1 L. R. 11 Cal. 784.

Whether the rule of estoppel is applicable when reformed land is resumed by Government and settled with the original proprietor for a term of years.

accepting such a lease or *ijara* as the case may be, the proprietors did not lose their proprietary right to the reformed lands, nor could any estoppel be urged against them. But their remedy may be barred on account of a title by adverse possession having been acquired by Government claiming a proprietary right thereto. This view may be supported by the opinion expressed by their Lordships of the Judicial Committee, in the case of *Secretary of State for India v. Krishnamani Gupta* (1), in the following passage: - "On the expiration of the first *ijara* settlement for ten years the estoppel came to an end and the Mazumdars might have asserted their title against the Government. But they preferred to renew their *ijaras* from year to year. This part of the case was not seriously contested by Mr. Mayne on behalf of the Mazumdars." In view of the successive *ijaras* it was held, in that case, that Government acquired title by adverse possession over twelve years.

The point of estoppel was directly raised in that case, before the Calcutta High Court, as appears from the extracts, quoted in the report of the case (see p. 525), from the judgment of Ameer Ali and Pratt, JJ., which was under appeal before the Privy Council. In that part of the judgment, where that point was discussed, the learned Judges are reported to have said thus:—"It appears to us that no question of estoppel arises in the case. The plaintiffs (Mazumdars) did not by any conduct on their part induce the defendant to alter its legal position so as to create an estoppel and although the Subordinate Judge seems to have thought that the plaintiffs were estopped by their conduct from disputing the title of the defendant, the question has not been argued in this Court. The senior Government pleader has practically conceded

(1) I. L. R. 29 Cal. 518 (534).

that there is no estoppel against them. Nor does it appear to us that the *thak* and survey maps of 1857 and 1859 in any way preclude the plaintiffs from establishing their rights to the lands in suit unless they are otherwise barred." (1). It would seem that the point having been conceded by the senior Government pleader, there was no discussion, in that case, with reference to the provision of Section 116 of the Indian Evidence Act which deals with 'estoppel of tenant.'

The passage, quoted above, from the judgment of the Privy Council, in the above case of *Krishnamani Gupta* (1), would seem to indicate that their Lordships were thinking of that section, where they said that the estoppel came to an end at the expiration of the term of the lease for ten years, and that the Mazumdars might have asserted their title against the Government (presumably after the expiry of the lease). In the cases of *Ranee Shama Soonduree* (2) and *Sarat Sundari* (3), cited before, no estoppel was urged on behalf of the Government. It should, however, be observed that in the former case the Government took possession of the reformed land under Cl. 3, Sec. 4, claiming a proprietary right thereto (see p. 506 *ante*) and that the plaintiff took a lease from the Government, so that it might not pass into other hands. In the latter case, the reformed land was settled with some of the proprietors of the original estate as an accretion to their estate, so that the Government did not claim any proprietary right. Consequently, in the case of *Sarat Sundari*, where no proprietary right was claimed, there could not have been any estoppel against the tenant under section 116 of the Indian Evidence Act, as the word landlord does not mean Government in its sovereign capacity.

Estoppel not applicable when Government acts in sovereign capacity.

This view is apparently consistent with what their

(1) I. L. R. 29 Cal. 518 (525-526).

(2) 22 Suth. W. R. 824

(3) I. L. R. 11 Cal. 784.

Lordships said in *Krishnamani Gupta's* case (1), where the *ijara* lands settled with the Mazumdars were claimed by the Government as an accretion to its *khas* mahals ; *i. e.* in proprietary right. The following passages from the judgment of the Privy Council are relevant to the point :—"On these facts the Government contend that the possession of the Mazumdars under the *ijaras* granted to them was in fact and in law the possession of the Government claiming proprietary right in the disputed lands, and that such possession was in exclusion of and adverse to the claim of the Mazumdars to be proprietors thereof. As regards the southern portion between the lines of 1845 and 1869, the learned Judges in the High Court have found that the Government were unquestionably in possession from the year 1859 to the year 1874-75, and they hold that, if the Government acquired an adverse title in respect thereof that title could not be lost unless they were out of possession of the same for sixty years."

"It may at first sight seem singular that parties should be barred by lapse of time during which they were in physical possession and estopped from disputing the title of the Government. But there is no doubt that the possession of the tenant is in law the possession of the landlord or superior proprietors, and it can make no difference whether the tenant be one who might claim adversely to his landlord or not. Indeed in such a case it may be thought that the adverse character of the possession is placed beyond controversy. On the expiration of the first *ijara* settlement the estoppel came to an end, and the Mazumdars might have asserted their title against the Government."

From the observations of their Lordships of the Judicial Committee, quoted above, it would seem to follow that also in those cases where the reformed land

is settled with original proprietors as *khas* estates, no estoppel can be urged on behalf of the Government against such proprietors, if they bring a suit for declaration of their right at the expiry of the lease for a term of *ten* years, but, if they go on renewing their lease, their remedy may be barred.

Estoppel not applicable when suits are brought at the expiry of the first lease for ten years granted by Government to proprietors.

Now, these are the *two classes* of cases under the *second* head which have been considered above⁽¹⁾. In one class, the re-formed land was settled as an accretion to the original estate, and therefore, the proprietary right to the accretion was with the proprietor, and thus, there could not be any estoppel, as in a case between the landlord and tenant: the case of *Sarat Sundari* (2). In the other class, a temporary settlement was made by the Government, for a term of ten years claiming a proprietary right to the re-formed land as in the case of *Rance Shama Sundaree* (3) where no estoppel was urged.

It, therefore, becomes necessary to discuss whether the maintainability of a suit for declaration of proprietary right to the land which reforms as an island on an original site can be questioned by the application of the principle of estoppel, when the original proprietor accepts a lease of the same from the Government for a term of ten years; in other words, whether he is entitled to maintain a suit during the continuance of the lease for a declaration of his own right to such reformed land. At first sight it would seem that the rule of estoppel would be applicable to such a case. When Government puts a person in possession of an island reformed on an original site, he is estopped from questioning the title of the Government at the beginning of the lease (see section 116 of the Indian Evidence Act). But, turning to the foundation of the principle upon which the law of reformation is based, it would be

Whether estoppel is applicable when suits are brought during the continuance of the lease of land reforming as islands on original sites.

(1) See pp. 573-74 *ante*.

(2) I. L. R. 11 Cal. 784.

(3) 22 Suth. W. R. 324.

apparent that possession of the site after submersion continues in the eye of the law with the original proprietor (see pp.540-42 *ante*). If, during the continuance of such possession, the proprietor accepts a lease from the Government, either with a view to prevent the passing of the property into other hands, or to avoid embarking upon costly litigations before ascertaining fully his own right, there, the case will be similar to that where a tenant being already in possession makes an attornment or acknowledgment of tenancy through ignorance, mistake or misapprehension; and in such cases, it is open to the tenant to deny the title of the landlord and prove the circumstances under which the lease was accepted. In support of this proposition, reference may be made to the cases of *Bance Madhab v. Thakoor Dass* (1); *Collector of Allahabad v. Suruj Baksh* (2); *Lall Mahomed v. Kallanus* (3); *Ketu Das v. Surendra Nath Singh* (4); *Gregory v. Doidge* (5); *Rogers v. Pitcher* (6); *Williams v. Bertholomew* (7); and *Sergeant v. Nash, Field & Co* (8).

*Collector of
Allahabad v.
Suruj Baksh.*

The case of the *Collector of Allahabad v. Suruj Baksh* is proposed to be stated at some length, as this decision throws some light upon the point under discussion. The facts of the case are follows:—"The respondent Suruj Baksh is the owner of a house erected on a plot of land in the katra bazar in this station, and he has instituted this suit to obtain a declaration of his right to occupy the land as the site of a dwelling house free from the payment of rent, which he asserts was illegally imposed on it by the Collector in August, 1862."

"According to the statement of the respondent, this plot of land forms part of a large area which was at one

(1) Beng. L. R. Sup. Vol. 588 (F. B.): 6 Suth W.R. 71 (Ac. N.).

(2) (1874) 6 N. W. P. H. C. Rep. 333. (3) 1 L. R. 11 Cal. 519.

(4) 7 Cal. W. N. 596. (5) 3 Bing. 474. (6) 6 Taunt. 202 (1815).

(7) 1 B. & P. 326 (1798). (8) (1903) 2 K. B. 304.

time included in the limits of a revenue paying mahal known as Fathepur Bichwa. Soon after the establishment of British rule in these provinces, the Colonel commanding the station obtained the lands abovementioned from the Maharaja of Jaipur, the then zemindar, in exchange for other land for the purpose of establishing a bazar."

"The area so acquired passed thereafter by the name of Colonelgunj, and was granted in plots to the persons who agreed to build houses thereon, to be held in proprietary right and rent-free. Under this arrangement the respondent and his predecessors in title occupied the site in respect of which this suit is brought without disturbance for upwards of 60 years. In 1857 the rights of the zemindars of the Mahal Fatehpur Bichwa were it is said confiscated for rebellion." In 1862 the Collector applied to the Government for permission to impose a rent on the sites in Colonelgunje on taking engagements from the occupiers and obtained the sanction. The respondent accepted a lease and there was no proof that he executed an engagement to pay rent. The suit was apparently brought within 12 years from the date of the imposition of the rent.

Upon these facts, the Court of first instance held that by accepting a lease, and making payments of rent, the respondent was estopped from questioning the right of the Government to collect the rent. On appeal, the Subordinate Judge of Allahabad dissented from that opinion and held that the lease was accepted under coercion, and that the payments of rent did not estop him from proving the facts. This view was upheld in second appeal to the High Court, (for the N. W. Provinces) by Turner and Oldfield, JJ.

In the case of the *Government v. Greedharee Lall Roy* (1) which is a converse case, estoppel was urged against the

(1) 4 South W. R. 13 (Civ).

Government. In that case, the name of the defendant was entered in the Collector's Register at the advice of the Legal Remembrancer and revenue was received from him for more than two years, and notwithstanding that, it was held that the Government was not estopped from instituting the suit for recovery of the property as an escheat on the ground that the defendant was not entitled to succeed in accordance with the letter of the Hindu Law.

Again, turning to the question of estoppel against the lessee from the Government, reference may be made to the case of *The Secretary of State v. Kalika Prosad Mookerjee* (1), where the question of estoppel was raised in the High Court, against the plaintiffs who accepted leases from the Government in respect of the disputed lands which were claimed as having reformed on original sites. In this case, it appears that the suit was not instituted during the continuance of the lease. But still the case may be referred to as throwing some light upon the question under discussion. It is true that the decision of the Calcutta High Court was reversed by their Lordships of the Judicial Committee in appeal to the Privy Council, in *Haradas Acharjya v. The Secretary of State* (2), but the view of the High Court on the question of estoppel was upheld. While dealing with the contention of the respondent (Secretary of State) relating to the settlements of lands accepted by the predecessors in title of the plaintiffs-appellants, Lord Buckmaster said thus:—"The next contention appears to have little weight, unless it can be used as an estoppel, and for this it is not clearly available. If the case depended upon verbal evidence, witnesses on behalf of the appellants would undoubtedly be confronted with the facts as to those previous dispositions of land for the purpose of showing that the conduct of the predecessors in title

Haradas
v.
Secretary of
State.

(1) 15 Cal. L. J. 281.

(2) 26 Cal. L. J. 590 (601).

of the plaintiff, was inconsistent with the claims they set up, but such questions might admit of satisfactory answers, and the contrary cannot be assumed."

"It is also urged by the respondent's counsel that when those grants were made to the appellants' predecessors they must have been in possession of materials satisfying them that their title was insecure. But this is mere conjecture, upon which no reliance can be placed. It is not even shown that the Chowhuddibandi papers were then accessible, and even if they were, the conduct of the parties would be quite consistent with readiness to avoid dispute by accepting a grant of the lands in controversy, rather than embarking upon a tedious and costly litigation."

The last few lines of the judgment of their Lordships would seem to indicate that no estoppel can possibly be applied, if leases are accepted to avoid tedious and costly litigations, and the fact itself would be good answer to oppose the application of the rule of estoppel.

Now, the decisions, cited above, are not directly in point with reference to the question whether the rule of estoppel applies when the original proprietor who accepts a lease from the Government, in respect of lands reformed as an island on the original site, institutes a suit in the Civil Court during the continuance of his lease. Except the decision in the case of the *Collector of Rajshahye v. Ranees Shama Soondurce*(1), other above-cited cases may be considered as being not directly applicable to the case of such land. But, there does not appear to be any intelligible reason why the principle involved in them should not apply to such a case in view of the law that the ownership of the submerged land continues in the original owner as discussed before (see pp. 540-42 *ante*).

Next, under the *third* head(2), it is proposed to refer to

(1) 22 Suth. W. R. 324.

(2) See p. 573 *ante*.

Government made defendants with lessees as having dispossessed the plaintiff in cases where lands re-forming as islands are settled with a third party.

cases which have been instituted by original proprietors when lands re-formed as islands are resumed by Government and settled with a third party. The special feature that should be noticed in this connection is that the Government has been made a party in view of the fact that when the lands reformed as *churs*, the Government took possession of and settled them with different persons; so that the first act of dispossession was exercised by the Government giving rise to the cause of action, and the possession of lessees or tenants under the Government was the possession of the Government. This evidently seems to be the view impliedly upheld in the following cases:—*Moner Lull Sahoo v. Collector of Sarun & others* (1); *Nogendro Chunder v. Mohom'd Esoff* (2) *Amereoounissa Khatun v. J. P. Wise* (3) affirmed by the Privy Council, in *Wise v. Amereoounissa Khatun* (4). In those cases, it appears that the reformed land having appeared as *chur* was taken possession of by the Government as *khut estates* and settled with a third party. It has been stated before (see p. 571 *ante*) that in respect of Khas Mahals in this country the Government occupies the position of a private zemindar, and in view of this distinction, it would seem that Government was made a party in the above cases most properly. For further discussion on this point, see under—"Whether Government is a necessary Party." *post*.

Cases relating to Reformations between rival Zemindars:—As to cases which fall under this head, it may be said that the substantive law has been discussed before, and that there is no other special feature in connection with them which need be discussed here excepting the question of limitation and evidence, which will be discussed later on.

(1) 14 Suth. W. R. 424.

(2) 10 Beng. L. R. 406 : 18 Suth. W. R. 113

(3) 24 Suth. W. R. 435.

(4) 6 Cal. L. R. 249.

Suits by Government against private proprietors:—If the Government bring suits for recovery of alluvial lands as having re-formed upon an original site, in such suits the Government must be supposed to be acting in the capacity of a private zemindar, or in other words, the Government will have to prove '*maliki*' or proprietary right on the original site. If it is proved that the Government dealt with the lands in dispute according to the provisions of Act IX of 1847 or Act XXXI of 1858, and settled with the defendants, the Government will be precluded from asserting its proprietary right in such suits; nor can in such a suit, a declaration be passed in favour of the Government that such a land is *khas* estate. This view would seem to follow from what has been laid down by the Calcutta High Court, in the case of *Sarada Prasad Ganguly v. Secretary of State*. (1). In that case, Government brought a suit to recover certain alluvial lands on the allegation that it was the proprietor of them and was put out of possession by the defendants; but it appeared that the Government had no right to them as proprietor and that on the contrary the *maliki* or proprietary right in them was in the defendants, and that they were alluvial lands which accreted to the estate of the defendants and the right of the Government to assess revenue upon them was declared long ago, and they were converted into separate estates and temporary settlements in respect of them were made by the Government with the defendants, and on their expiry, it held them *Khas* in its own hands adversely to the defendants. Upon these facts, it was held that, having regard to the allegation of title on which the Government based the suit and the past conduct of the Government in reference to those lands, the Court ought not, at this stage of the case in appeal to change the entire form of the suit and to make

Suits for reformed land by Government as private proprietors.

Circumstances under which estoppel may be urged against Government.

(1) 14 Cal. L. J. 98.

a declaratory decree, in the event of the Court deciding the question—whether the lands appertained to the plaintiffs or to the defendants' estate—in favour of the Government to enable it to take hereafter the necessary steps for assessment and settlement.

It appears from the judgment of that case that question of estoppel against the Government was raised and the Government not having stated fully and fairly its reason for desiring to repudiate the actions of its own officers under the provisions of Act IX of 1847, the suit was dismissed.

No estoppel
when fraud is
established.

It may be observed in this connection that it would be open to the Government to avoid the legal consequences of the acts of its own officers who took proceedings under the provision of Act IX of 1847, if any fraud or deception upon the Government in respect of that matter had been alleged and proved. (See *Muktakeshi v. The Collector of Burdwan*) (1).

In the case of *Ananda Hari Basak v. Secretary of State* (2), the Government instituted the suit for recovery of land as reformation *in situ* and also as an accretion to an estate belonging to Government. In that case a part of the land claimed by Government reformed on the old site of a *chur* which had been originally taken possession of by Government under Clause III, Sec. 4, Reg. XI of 1825. It has been held in that case that the *chur* thus taken possession of by the Government becomes *khas* estate, and that, in this view, the Government is entitled to claim the land which reforms upon the diluviated site of such *chur*. (See pp. 516-518 *ante*).

In Madras, a similar view has been held in respect of the right of the Government to bring a suit for declaration of its title and ejectment. In the case of *Secretary of State v. Vira Rayan* (3), it has been held

(1) 12 Suth. W. R. 204.

(2) 3 Cal. L. J. 316.

(3) I. L. R. 9 Mad. 175.

that in such a case the Government must show that not only it has a proprietary right but that such right is subsisting and not lost by adverse possession. Should the Government fail to prove such title and possession, the suit shall be dismissed. But such dismissal would not affect the right of the Government to claim revenue in respect of the land in dispute.

Suits for declaration of the right to a settlement of alluvial land from Government :—

It is proposed, under this head, to refer to the cases which are instituted when the Government makes a settlement of alluvial lands with persons other than those who are entitled to them under the provision of Regulation XI of 1825. It would seem at first sight rather anomalous that a suit can be maintained in a Civil Court in respect of any settlement of alluvial land made by the Government for the purpose of revenue, which is a matter where by the law the Government is the final authority. It, therefore, becomes necessary to discuss shortly the following two points, namely, *first*, whether such a suit is maintainable and *secondly*, whether the Government is a necessary party.

To understand the maintainability of such suit, it is necessary to refer to the substantive law, laid down by Reg. XI of 1825. By Cl. 1, Sec. 4, it declares that an alluvial accretion to the property of the riparian owner belongs to him, subject to the payment of additional revenue to the Government in respect of it, as may be assessed by such authority. So it is clear that the proprietary right is with the riparian owner, and in cases where he refuses a settlement, the Government engages with a third party for revenue in respect of it, but his proprietary right continues and is recognized by the payment of *malikana* (see pp. 293-298 *ante*), which keeps alive the right of the riparian owner to come in for the property and to obtain a declaration in a Civil Court

Suits for
declaring the
right to
settlement
from
Government.

for such right. The Government has no interest in the land excepting the right to obtain revenue. (See pp. 293-295 *ante*). This view has been expressed by the Calcutta High Court, in the case of *Kristo Chunder Sundyal v. Kashee Kishore Roy* (1), where Government resumed an alluvial accretion to a zemindari and retained it *khas* for sometime, and then, after having settled it temporarily with a third party for few years, made a permanent settlement of it with the 8 annas sharer of the zemindary. Plaintiff who was the owner of the remaining 8 annas share of the zemindary brought that suit to have it declared that he was entitled to a share in the settlement. In delivering the judgment, Markby, J., on the point of the competency of the suit, said thus :—"Without going minutely through the language of the Regulation I think it quite clear that it has been the invariable practice in the country to allow a person, who alleges that he is entitled to a permanent settlement, to come into the Civil Court to obtain a declaration of that right, and the Government has invariably recognized the right so declared by making or altering the permanent settlement accordingly."

In the case of *Maharaja Rajendar Pertap v. Lalljee Sahoo* (2), the claim was that the settlement made by the Government for revenue with the defendants be set aside and the alluvial lands in question be restored to the plaintiffs. The plaintiffs in that case were the zemindars of Mouzah Sohagpore (Zillah Tirhoot) and the defendants, Zeminders of Mouzah Doomre (Zillah Sarun), and these mouzahs were divided by the river Gundock at the Permanent Settlement, with Sohagpore on the northern bank and Doomree on the southern bank of the stream. In 1837 the river got into its southern channel and a quantity of *chur* land to the

(1) 17 *Suth. W. R.* 145.

(2) 20 *Suth. W. R.* 427.

north was resumed by Government and a temporary settlement of it was made with zemindars of Sohagpore. In 1846 the settlement was renewed with the same zemindars who remained in possession of it until 1848, when the river returned to its northern channel, and the *dearah* land was claimed by the zemindars on the southern or Sarun side of the river, in consequence of which an Act IV of 1840 suit was instituted which was decided in favour of the zemindars of Sohagpore. In 1856, on the expiry of the last temporary settlement, the question arose with whom Government should engage for revenue, and it was finally decided by the Board of Revenue that settlement should be made with zemindars of Doomree, who accordingly obtained possession. The plaintiffs thereupon brought this suit.

The Principal Sudder Ameen who tried the case at first dismissed the suit on some technical grounds and also on the ground that the decision of the Board of Revenue that the settlement should be made with the defendants was final and conclusive. This decision on appeal to the High Court was reversed and the case was remanded for retrial upon the merit. The Principal Sudder Ameen again dismissed the suit on the merit, which decision was reversed by the High Court on appeal. The defendant having preferred an appeal to the Privy Council against that decision, the case was again remanded to the Principal Sudder Ameen who passed a decree in favour of the plaintiff. Again, this decree in favour of the plaintiff was set aside by the High Court on appeal, but in appeal to the Privy Council, in the case *Rughoobar Dyal Sahoo v. Kishen Pertab Sahoo* (1), the decision of the primary Court in favour of the plaintiff was restored.

Thus, as the result of the suit instituted by the riparian proprietors of Sohagpore who had the

proprietary interest in the alluvial land in dispute as being an accretion to their estate under Cl. I, Sec. 4, Reg. XI of 1825, and with whom only temporary settlements were made on the two previous occasions, the engagement for revenue made by the Government in respect of the same land with the proprietors of Doomree was set aside. (As to the effect of temporary leases, see pp. 298-300 *ante*),

In the case of *Cally Chunder Chowdhury v. Moni Kurnika Chowdhurain* (1), the plaintiff claimed the right to settlement of the land resumed by Government which after having been given to the defendant in temporary leases for some years, was permanently settled with him. The claim of the plaintiffs was allowed by the Principal Sudder Ameen who allowed the increment to be apportioned between the plaintiff and defendant upon a wrong principle, namely, according to the loss created by diluvion since the perpetual settlement. On appeal to the High Court, the case was remanded with a direction that the right to the settlement of the accretion would be with the party to whose estate the land attached immediately.

It may be observed here that a number of cases of this description will be found discussed under the head of the Law of Limitation : see *post*.

In *Khas Mahals*.

A similar suit appears to have been instituted even by the tenants of *Khas* manals. In the case of *Abdul Kadir v. Hamdu Miah* (2), the plaintiff who obtained a Pottah from the Collector, claimed the land in dispute as alluvial accretions to his holding. On an application to the Commissioner the settlement with the plaintiff was set aside and an order was passed for engagement with the defendant No. 2. Thereupon the plaintiff brought that suit in order to have it declared that he

(1) 1864 Suth. W. R. (Gap No.) 149.

(2) 12 Cal. W. N. 910.

was entitled to the settlement of the land as an accretion. Courts below gave the plaintiff a decree, which was affirmed in second appeal by the High Court.

Whether Government is a necessary party in such suits —

In order to answer the question, it is necessary to appreciate fully the interest of the Government in the suits of the above nature. It is a well-established proposition in this country that the Government has no proprietary interest in any alluvial increment to an estate or tenure and the only right reserved by the Government is the right to assess revenue (see pp. 293-294 *ante*). It is immaterial for the Government to see whether the revenue assessed according to the provision of the law of this country, is paid by the person with whom the settlement for revenue was made or by any person who can establish a better title to such increment by a suit in a Civil Court.

Interest of Government is limited to assessment of revenue.

In fact, in a suit instituted by the Government for possession of alluvial increment after the declaration of the right of an individual claimant to such an accretion and for reversal of decrees between rival claimants, it was held that the Government had no *locus standi* to maintain such suit. In *Mooktakeshree Debee v. Collector of Burdwan* (1), the Government set up a claim to the *chur* land that formed a portion of Chur Bikihaut, which was described as a gradual accretion to an estate called Mouza Bikihaut, and this *chur* was resumed by Government and temporary settlements had been made by the Government one after another with one Kettermohee, and at last, with the zemindar himself. The defendant a putnidar of another Talook Daihaut brought action against the Putnidar of Bikihaut and recovered decrees by means of which she entered into the possession of

Government has no *locus standi* to maintain a suit after adjudication of the right between private parties to alluvial accretion.

the land in dispute. The Government, thereupon, claimed to have a cause of action as having arisen out of such decrees and instituted the suit. While dismissing the suit in second appeal to the High Court, Jackson, J. said :—"It seems to me very clear that, upon that statement of facts, the Government, having made a settlement, whether temporary or permanent, of the land in dispute, had a right to the revenue arising from that land, and in case of default, recover the revenue by sale of the property, but had no right whatever to the actual possession of the land ; and it seems almost needless to say that Government could have no *locus standi*, as plaintiff to ask the Court to set aside judgments in suits to which Government was no party, and by which it could not possibly be affected." With regard to the right of the Government, Markby, J. in the same case observed thus : "The right of Government in the case of such an accretion as this must be now held to begin and end in the right to assess revenue, and I think Government was bound for that purpose to accept the result of the litigations between the owners of the respective mouzahs, and to settle the revenue with the person who was then declared to be the owner."

The decision, cited above, lays down in clear terms that the only right possessed by the Government in respect of an alluvial accretion to an estate or tenure is the right to assess the revenue and that the Government is bound to accept the result of litigation between rival claimants in respect of such accretion and settle the revenue with him who is declared to be the owner by Civil Courts.

The right of Government is limited to assessment of revenue.

The interest of the Government being thus limited to the assessment of revenue, it has no reason to be affected by the result of the litigations between contesting rival proprietors as has been pointed out by Lord Romilly, in a somewhat similar case, *Ganga Gobind*

Mundul v. The Collector of 24 Pergunnahs (1), where his Lordship observed thus :—"The Government has no title to intervene in such contests, as its title to its rent in the nature of *jumma* is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to *jumma* is not affected by a transfer of proprietary right, whether such transfer is effected simply by transfer of title, or less directly by adverse occupation and the law of limitation." It may, therefore, be held that Government is not a necessary party in a suit where two private claimants contest for the possession of any alluvial accretion to any estate or tenure.

Now, referring to the decided cases, it would be seen that there is a conflict of opinion on this point. In the case of *Kristo Chunder Sundryal v. Kashee Kishore Roy* (2), which was a suit for declaration of plaintiff's right to a share in the settlement of an accretion by the Government, an objection was distinctly raised that the Government should have been made a party to the suit as a defendant. In overruling this objection, Markby, J., said : "The Government, moreover, has no sort of interest in such a suit, the remedies which they have making it almost entirely a matter of indifference to them with whom the settlement is concluded. And though, under some circumstances, it might be convenient to make the Government a party to the suit, and though this has been sometime done, it is by no means, as far as I can discover, the invariable practice to do so. I think, therefore, that we ought to hold that the suit will lie and the omission to make the Government a party is not a ground for dismissing the suit." Bayley, J., concurring in the same judgment, observed on this point thus :—"The plea, that there is a defect of parties, because Government was not a party, is untenable, because the plaintiff's suit against the defendant here is one which

*Kristo
Chunder v.
Kashee
Kishore.*

Government
is not a
necessary
party in such
suits.

(1) 11 Moo. I. A. 345 (363).

(2) 17 Suth. W. R. 145.

can be decreed or dismissed without the right of the Government being affected. Whoever is or becomes the recorded proprietor will be answerable for the revenue, and, in default, the estate will be sold for the recovery of the arrears in the name of the recorded proprietor."

*Mahomed
Israil v.
Wise.*

Government
is a necessary
party.

But, the decision of the Full Bench in a similar case, *Mahomed Israil v. J. P. Wise*. (1), throws some doubt upon the view expressed above. In that case, the plaintiff, an ex-lakhirajdar, instituted the suit for possession of land after an adjudication of his right to settlement, alleging that he was the rightful owner of the lands which had been resumed by the Government and that the defendant by false allegation of ownership and possession induced the Revenue Authorities to enter into a settlement with him. The question that was referred to the Full Bench in that case was, whether, on the above allegations, the plaintiff was entitled to an adjudication of his right to settlement, or whether it was discretionary with the Collector under such circumstances to settle the lands with any person he pleases, and such settlement is final as regards all claims. Sir Richard Couch, who delivered the judgment of the majority of the Full Bench, in answering the first part of the question in the affirmative and the second part in the negative, added the following observations :—"It appears to me that there has been an error in the proceedings in holding that the Government was not a proper party to the suit. The Government having given a lease of the lands to another person, it was proper that it should have an opportunity of showing that this had been properly done. If the Government were a party to the suit, the person who got the lease from the Government might be freed from liability upon it. Now another suit will be necessary to finally decide the matters between these parties, as the Government being no party

(1) 21 *Suth. W. R.* 327.

to this suit will not be bound by the decision in it." Next, after remanding the case, the learned Chief Justice added thus :—"The defendant is in possession under a lease from the Government, and the Government should be made a party to the suit in order that (if it is clear that the plaintiff is entitled to the lease) the defendant Wise may be released."

Now, it is apparent that, whether the Government should be made a party to that suit or not, was a question, not referred to the Full Bench as was pointed out in the same case by Markby, J., who was a number of that Bench. The view expressed by Sir Richard Couch in the above case was explained and distinguished in the following case, decided by Markby and Prinsep, JJ.

In *Girdharee Sahoo v. Heera Lall Seal* (1), it has been held that in a suit by A against B for possession of land which has been surveyed and settled at one time as an accretion to the estate of A, and at another time as an accretion to the estate of B, it is not, as a rule, necessary that the Government should be made a party. In that case, the defendant, among other objections, pleaded that as plaintiff contested a settlement made by Government, it was necessary to make Government a party to the suit. In overruling this contention of the defendant appellant, Markby, J., said :—"In my opinion, the contention that the plaintiff was bound to make Government a party to this suit cannot be supported. The plaintiff prays for no relief against Government, and asks nothing from Government, and the only reason suggested to us why the Government should be made a party is, that the defendant may in some way or other be relieved from what is called his engagement with Government as to payment of revenue. Now it may be, that if the plaintiff succeeds in this suit, and there has been no fraud, the defendant will have a grievance. His estate,

*Girdharee
Sahoo v.
Heera Lal.*

Government
is not a
necessary
party.

though somewhat reduced, will remain burdened with an assessment calculated upon a larger area; but the Civil Court can not redress this grievance. It is admitted that, for this purpose, the defendant would have to apply to the Government. It is, of course, just possible to conceive, though it is very improbable, that the Civil Court in adjusting the boundaries between two adjoining estates, might so far reduce the value of one of them as to affect the security of the revenue; but if so remote a contingency as this were considered as affecting the interests of Government, it would be necessary to make Government a party to every suit between adjoining proprietors as to their boundaries. This has never been the practice, and it would be most undesirable, in my opinion, to introduce it. It would involve Government in a mass of litigation without any corresponding advantage." With regard to the opinion expressed by Sir Richard Couch in the Full Bench (*Mahomed Israil*, 21 W. R. 328), it was held in that case that, that was not the decision of the Full Bench but of the Chief Justice alone, and that it was distinguishable. Pinsep, J., agreeing with Markby, J., in that case, said:—"I am also of opinion that the suit was properly tried without making the Government a party to it, as it can not be said, in the words of section 73, Act VIII of 1859, that Government is entitled to or claims some share or interest in the subject matter of the suit or is likely to be affected by the result. The judgment of the Full Bench (21 W. R. 327), as delivered by Sir Richard Couch, the late Chief Justice, has been explained to us, by other Judges who comprised that Court, in the manner just stated by Mr. Justice Markby, and does not therefore stand in the way."

Thus, the preponderance of judicial opinion and the interest of the Government in such matters make it abundantly clear that the Government is not a necessary party in a suit, where contest is raised with regard to the

ownership of any alluvial increment, the settlement of which has been made by Revenue Authorities according to the provision of the law existing in this country. This position is further supported by the provision of the present Code of Civil Procedure of 1908, which by Or. I, Rule 9 lays down:—"No suit shall be defeated by reason of the mis-joinder or *non-joinder* of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." The word *non-joinder* in this section was inserted for the first time in the Code of 1908, and in the Code of Civil Procedure of 1882, or in any earlier code the word *non-joinder* does not appear to have found a place in the corresponding section. So the absence of the Government as a party defendant in such a suit can not be fatal in any view of the matter.

But, in those cases where Government asserts its proprietary right by resuming *chur* lands and making temporary settlement of it with persons other than those who consider themselves entitled to it, it would be proper that the Government should be made a defendant to such a suit, as the cause of action in such cases will invariably arise from the dispossession made by the Government, by making a temporary settlement of it with other tenants. This point has been briefly dealt with under "Suits regarding Reformations Generally." See p. 582 *ante*.

Government is a necessary party where its interest is proprietary.

Claims under separate clauses of the Regulation are distinct titles:—

Claims under the several clauses of the Regulation have been considered by our Judiciary as constituting distinct and separate titles. If a person come into Court setting up a title under one Clause, he can not alter his claim subsequently and set up a title under another Clause. Cases of gradual accretions, contiguous accessions, avulsion, or re-formations *in situ* are to be distinct-

ly and separately set forth pleaded, and proved, and Courts will have to arrive at a finding in respect of each of them separately. Reported cases, cited below, will clearly illustrate this position.

Claim under Cl. 1 not allowed to be converted into one under Cl. 5 in appeal.

In the case of *Eckowree v. Hira Lall Seal*(1), where the plaintiff went to trial in the Court below, alleging that the land claimed was attached to his estate as alluvial, he was not allowed to raise in appeal a different case, namely, one simply of original ownership of the site of the lands reformed. Lord Chelmsford, in delivering the judgment of the Privy Council, observed on this point as follows :—"This suit is brought to recover about 1000 bighas of land claimed as alluvial, and contained within the boundaries given in a map annexed to the plaint. The plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz, one simply of original ownership of the site of the lands reformed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil, which defence, as is apparent from the frame of Beng. Reg. XI of 1825, would admit of variation with varying circumstances of inundation, identification and accretion."

Claim by Government only under 2nd part of Cl. 3 precludes a determination of claim under 1st part of Cl. 3

In *Mussmt. Tabira v. The Government*(2), the Government instituted the suit to get possession of the *chur* lands in front of their purchased landed property in Dinapore on the original bank of the Ganges. The Principal Sudder Amin of Patna gave the plaintiff, Government a decree under the provisions of Clauses 1,2,

(1) 12 Moo. I. A. 136 : 11 Suth. W. R. 2 (P. C.)

(2) 6 Suth. W. R. 123

and 3 of Sec. 4 of Regulation XI of 1825. Against this decree appeals were preferred to the High Court. On behalf of the defendants-appellants it was contended that the Government, in the suit, not having come forward as sovereign power and taken possession of the newly-formed lands as an island surrounded by an unfordable stream, but as an ordinary riparian zemindar, was bound to prove either gradual accretion, or the stream between the old bank and the newly formed lands was fordable when the latter came into existence. In upholding this contention the High Court of Calcutta observed thus :—"This case can not be treated as coming under Clause 1, Section 4, Regulation XI of 1825, for the lands in litigation are evidently not a gradual accretion to the original lands of plaintiff's village of Dinapore, but have formed opposite to it in the shape of an island, there being a running stream between it and the mainland. If the island, at the time of its formation, were surrounded with water unfordable at any time of the year, the Government, as sovereign, would have undoubted right, under Cl. 3 of the above law and Act IX of 1847, Section 7, to take possession. Government, however, does not come into Court in this capacity or with this allegation. Government is inclined to treat the new formation as an accretion to a Government purchased property, which it is not, and comes into Court as a private zemindar. The law applicable to such a case is the latter part of clause 3 of section 4, Reg. XI of 1825. If the stream between the chur and the mainland be fordable any season of the year, it must be considered an accession to the land of the person or persons, whose estate or estates may be most contiguous to it. The Government, therefore, before it can establish its right to any portion of the chur lands, must prove that the stream is fordable at sometime of the year, and that it was fordable when the alluvium formed."

This judgment was affirmed upon an application for review, in *The Government v. Mussumat Tabira* (1), where it has been held that when the Government claims land as a riparian proprietor under the latter part of Cl. 3, Sec. 4 of Regulation XI of 1825, it must have to prove that stream between the mainland and the land in dispute is fordable at any season of the year. It would seem from the passage, quoted above, from the previous judgment, that it was open to the Government to lay a claim to the land in dispute under the former part of Cl. 3, Sec. 4, namely, as sovereign power, but that claim not having been preferred, it was held that the Government had failed to establish its rights to the alluvial lands in dispute, and the suit by it was therefore dismissed.

Setting up a case only under Cls. 1 & V precludes the adjudication of title under the 2nd part of Cl. 3.

In the case of *Kalce Pershad Mojoomdar v. The Collector of Mymensing* (2), the plaintiff claimed the land in dispute as having reformed in the site of his diluviated mouzah in contiguity with or as an accretion to his *uslee* land. That claim having been found to be barred by limitation, the plaintiff wanted to rest his claim on the latter part of Clause 3, Sec. 4, Reg. XI of 1825. In regard to the last part of the plaintiff's case, Mitter, J. said:—"The plaintiff has completely failed to make out the case with which he came into Court; and I do not think that he is now entitled to rest his claim on Clause 3, Section 4, Regulation XI of 1825. No issue was joined on this point, and no evidence has been given. I decline to give any opinion on this point."

Title to diluviated bed as part of a mehal having failed claim under Cl. 5 not allowed.

In the case of *Ranee Surnomoyee v. Jardine, Skim & Co.* (3), it was contended before their Lordships of the Judicial Committee on behalf of the plaintiff that, even if the land (dried up river bed) in dispute was not part of the *khas* mahal, either originally or as an accre-

(1) 7 Suth W. R. 513.

(2) 13 Suth. W. R. 366.

(3) 20 Suth. W. R. 276.

tion to the island within the meaning of Regulation XI of 1825, she was still entitled to it upon the general principles of equity and justice according to the provisions of Clause 5, Section 4 of that Regulation. In overruling this contention, their Lordships said :—"It appears to their Lordships that the land in dispute was not gained by alluvion or dereliction of a river within the meaning of that clause. Further more, the plaintiff did not, in her plaint, rest her case upon the provisions of that section or upon the principles of equity and justice.....But, even if—she were entitled to rely upon the 5th clause of Section 4 of the Regulation above referred to their Lordships fail to discover upon the facts disclosed, any general principles of equity or justice in her favour." These observations of their Lordships go to show that if the plaintiff had a case to rest upon the general principles of equity and justice as laid down by Clause 5, Sec. 4, of Reg. XI of 1825, she should have made it out distinctly in her plaint. But it is worthy of notice in this connection that the words of that clause are that the Courts of Justice in deciding such claim shall be guided by general principles of equity and justice, and not that such a claim shall have to be made out in the plaint as resting upon general principles of equity and justice.

In the case of *The Court of Wards v. Radha Pershad Singh* (1), the plaintiff claimed the lands in dispute under Clauses 1 and 2 of Section 4, Reg. XI of 1825, and did not allege in the plaint that, by possession over twelve years he had acquired a title to the lands in dispute or to the original site upon which the land in dispute reformed. His case as set up in the plaint not having been established upon the facts found ultimately in appeal to the High Court, a question as to his title by adverse possession of the alluvial lands in dispute

was raised, as being one of the issues framed by the High Court, while remanding the case for the second time. In disallowing this claim, Sir Richard Couch referred to the observations of Lord Chelmsford which have been quoted above (see p. 596 *ante*) and then said:—"What is said there will apply to the present case. The plaintiff does not seek to prove a title by original ownership of the site, but he seeks to prove a title by ownership for twelve years. He ought not to be allowed to do this. If he had rested his claim upon such a title when he brought the suit, some other matters might have had to be inquired into than have now been inquired into."

Claim set up only under Clause 1 was not allowed to be varied to one founded upon original ownership.

In a Madras case, *Sri Balusu v. The Collector of the Godavari* (1), the plaintiff and defendants were riparian proprietors of adjoining estates in both banks of the river Godavari. The plaintiff claimed the right to newly formed land in the middle of the stream, which she alleged to have formed by accretion upon an already existing *lanka* or alluvial island which belonged to her. On that point the concurrent findings having been against her, it was argued on her behalf that she was the owner of the whole bed between the banks owned by her, and therefore she had the right to every formation of soil on that bed. Such a claim not having been made out in the pleadings or issues, the High Court did not decide that point. On appeal to the Privy Council by the plaintiff the last point was raised and in overruling this contention, Lord Hobhouse, who delivered the judgment of their Lordships, said thus: "They then addressed themselves to the claim which the plaintiff urged to be owner of the whole bed of the river between the banks owned by her, and therefore of every formation of soil on that bed. Upon that claim their Lordships observe that it is not made by the pleadings or

(1) I. L. R. 22 Mad. 464 (468-469).

by the issues settled by the District Judge. The third and fourth issues relate simply to accretion to some previously existing dry land, and the question raised was whether that was the plaintiff's land or the defendant's. The subaqueous ownership now claimed by the plaintiff raises a totally different question on which much evidence might and probably would have been given ; and that question was not tried by the District Judge. The High Court would have been quite justified in refusing to entertain the question until raised by proper issues and evidence." In the result, it was held by their Lordships, in that case, that the plaintiff must abide by the claim presented by her and she could not be allowed to vary her claim to one founded upon the ownership of the bed.

Now, the claims under the different Clauses of the Regulation having been regarded as a distinct title as shown before by referring to the cases cited above, it would become incumbent upon the Courts of Justice to arrive at a distinct and separate finding in respect of each of such titles. If a person come into Court claiming the land in dispute either as a reformation *in situ* or as an accretion, his suit can not be dismissed only upon the finding that his title by reformation has not been established. It would also be necessary, in such cases, to determine whether his title as an accretion has been made out. Cases like this would come under the general law where the Court below may have failed to try any particular material issue, and they, therefore, do not require to be discussed at length in this book.

Cases where one part of the alluvial land in dispute is claimed as a reformation and another part as an accretion, it is necessary that there should be a distinct finding as to how much of it is a reformation and how much is an accretion: *cf. Rashmonee Dasse v. Bhubonath*

Title set up under each clause to be severally dealt with.

Bhattacharjee (1) and *Babu Puhlwan Singh v. Maharaja Mohesur Buksh* (2). When a title is set upon an immemorial custom as provided by Sec. 2 of the Regulation, Courts below not having arrived at any finding as to such usage, their decisions were reversed in appeal. See the case of *Maharaja Rajendur Pertab v. Laljee Sahoo* (3).

When two alternative pleas are set up in defence, the defendants are entitled to be heard on both of them. In *Puhlwan Singh v. Maharaja Mahesur Buksh* (4), Kemp, J. in delivering the judgment of the High Court, with regard to the alternative plea, said :—"With reference to the alternative plea taken by the learned counsel for the defendants, we wish to make a few observations. If the defendants had stated their case honestly, and, while admitting that the lands were alluvial lands, had claimed them under the alluvial law, either wholly or in part, we should have been prepared to give them the full benefit of the provisions of Regulation XI of 1825 ; but, when we find them taking their stand upon a line of defence which sets up the special provisions of clause 2, sec. 4, Regulation XI of 1825, and denouncing the averments of the plaintiff-appellant, that the lands were of gradual formation as wholly false, we must hold them to their plea ; and as they have wholly failed to prove it, we dismiss the appeal" Their Lordships of the Judicial Committee, in overruling this view, in appeal, [in *Babu Pullwan Singh v. Maharaja Moheshur*] observed thus :—"The High Court, on this part of the case, took a view which certainly appears rather surprising, that because the defendants had mainly no doubt, and principally denied that the land had accreted at all, and had said that it had been caused by a sudden change in the river, and had not been caused

(1) 12 Suth. W. R. 252.

(2) 16 Suth. W. R. 5 (P. C.)

(3) 20 Suth. W. R. 427.

(4) 1864 Suth. W. R. Gop No. 191.

by gradual accretion ; that because they said that and failed, they were not entitled to rely on their second defence, which is most clearly stated in their pleadings, is most clearly stated in the issue and is also stated in the judgment of the first Judge in the Court below. It is to their Lordships perfectly clear that the mere fact of their having relied on their first defence could not possibly prevent them also relying on their second defence if the first defence failed. The final result is that there must be a division of the disputed land, each state taking that which is *ex adverso* its own frontage." (1)

Next, in determining disputes relating to lands gained by alluvion or dereliction of a river or the sea, the finding arrived at by the Courts of Justice should be such as to constitute a title contemplated by the specific expression of the Regulation. It would not be a sufficient finding to support a decree that the land in dispute formed opposite to the village of the plaintiff and then joined on to his land. It must be a case either of *gradual accretion* as contemplated by Cl. I, Sec. 4, or *contiguous accession* as contemplated by the second part of Cl. III, Sec. 4, to entitle the plaintiff to support his claim under the Regulation, in such a case. This view was upheld by the Calcutta High Court in the case of *Unnopoorna Debia v. Sreemutty Dossee* (2), where the plaintiff claimed certain *chur* land as accretions to his village, and the Lower Appellate Court gave him a decree upon a finding that lands *accreted to and were joined on to his villages*. In second appeal, while remanding the case, L. Jackson, J., observed :—"Now, the Judge has only stated here that the land had formed by gradual accretion, and that it formed opposite to the villages on the main bank, and then joined on to the plaintiff's village. We do not understand this to mean, indeed we hardly

The finding of a claim under any clause must be in conformity with words of the Regulation.

(1) 16 Suth. W. R. 5 (P. C.)

(2) 14 Suth. W. R. 354.

think the Judge would have expressed himself in that way, if he had meant, that the lands had formed by way of gradual accretion to the villages opposite to which they were situated, but rather that, having formed opposite to those villages, they subsequently became contiguous to them by the gradual silting up of the bed of the river which had previously flowed between them."

"We think, consequently, that the case must go back. The case must be re-tried before the Judge, in order that he may determine upon the evidence how this land formed ; and if it was the result of gradual accretion, to what lands it so accreted ; and that he may determine, the rights of the parties in precise conformity with the words of the Regulation ; that is to say, he will find to whose land or tenure the formation is most contiguous." See also *J. P. Wise v. Juggobundhoo Bose* (1).

In the case of *Narendra Bahadur Singh v. Achhai-bar Shukul* (2), the plaintiff claimed certain land which was formerly in his possession as part of village Simri and which re-appeared after having remained submerged for some time owing to the sudden change of the river Gogra. The defendant contended that he was entitled to maintain his possession of it as a gradual accretion to his village Bili Khurd. As to the finding arrived at by the Lower Appellate Court, the Allahabad High Court said thus :—"In one part of his judgment he states that the river Gogra in the year 1882 'suddenly changed its course and began to flow north of Simri and south of Bili Khurd, submerging two intervening villages.' He further finds that, according to the settlement papers of 1834-85, '29 bighas and 4 biswas of the village of Simri are shown to have been washed away by the river', and that, according to the 'quinquennial settlement of 1888-89, 136 bighas, 3 biswas 4 dhurs, which

(1) 12 Suth. W. R. 229.

(2) I. L. R. 28 All. 647.

had formerly belonged to Simri, were found to have been added to Bili Khurd,' and then he finds that in the 'settlement of 1893-94 the whole area of Simri was *either under water or had gradually accreted to Bili Khurd*.' 'In view of these findings it is difficult to understand how it can be said that the land in dispute which admittedly was included in the area of monza Simri *gradually accreted to Bili Khurd*." In the result, the case was sent back to the Lower Appellate Court for determining two issues, one relating to the title set up by the plaintiff, and another respecting the defence urged by the defendant.

It has been said before that claims under the different Clauses of the Regulation constitute a distinct title (see pp. 595-600 *ante*). Now, a question arises whether a person who fails to establish in one suit a title under one Clause, is precluded from instituting another suit claiming a title under a different Clause : in other words, would the second suit be barred by the application of the doctrine of *res-judicata*? To take one illustration of this class of cases, reference may be made to the case of *Krista Mohun v. The Collector of Dacca* (1), where the plaintiff's claim in respect of the land in dispute as reformation on the original site failed ; would that preclude the plaintiff from instituting another suit claiming the identical land as accretion to his estate under Clause I, Sec. 4? In fact, the concluding portion of the judgment of Jackson, J., in that case would clearly seem to negative such contention in the subsequent suit, the title as shown before being distinct in two suits. The portion of the judgment in question runs thus :—"It is altogether another question whether the plaintiffs are entitled to the accretions on condition of their paying additional revenue to Government in respect of the lands accreted. This is not a question at present before

Whether the doctrine of *res judicata* bars a fresh suit claiming title under a different clause of the Regulation.

us." Evidently the title to be set up in the subsequent suit was not "*directly and substantially in issue*" in the former suit.

With regard to the qualification, namely, *litigating under the same title*," it may be contended that the plaintiff in the former suit claimed the land in dispute as owner of the site or bed upon which the land re-formed and that in the subsequent suit, the plaintiff claims the land in dispute as owner of the mainland to which the accretion has been annexed.

As to "*Any matter which might and ought to have been made ground of defence or attack in the former suit*," it may be urged that in the former suit in which alluvial land was claimed as reformation, the original site was alleged to be a *private* property, but in the latter suit, the site or bed is presumed to be *public* property. Thus the foundations of two claims are conflicting and incongruous, and might lead to confusion.

In the above view, it may be held that the title in the latter suit was not constructively in issue in the former suit, and so the latter suit would not be barred as *res judicata*.

It may be further noticed in this connection that the question of the title by accretion having been expressly left undecided, in the above case of *Kristo Mohun*, a subsequent suit for the establishment of that title, if instituted, can not be considered as barred by the doctrine of *res judicata*.

Similarly, in the cases *Eckowree Singh v. Heera Lal Seal* (1) and *Sri Balusu v. The Collector of the Godavari* (2), where the plaintiffs were not allowed to raise the question of the title by reformation on the original site at the appellate stage, a subsequent suit in respect of the same land under that title, if instituted, can not be held barred as *res judicata*.

In the case of the *Government v. Musst. Tabira* (1), the Government came into Court claiming a title to the land in dispute under Cl. I. Sec. 4, and it was not, therefore, allowed to raise a claim in the same suit to the same land as sovereign power under the 1st part of Clause III, Section 4. In such cases, it would be open to the Government to bring another suit for the same, claiming a title thereto as sovereign power under Cl. III, Sec. 4.

But the position would be different, if a second suit is brought in respect of any alluvial land as an accretion to one Mahal, which was claimed as a gradual accession to another Mahal in a previous suit, where both of the Mahals belong to the same plaintiff. This point was directly raised in the case of *Kashee Kishore Roy v. Kristo Chunder Sandyal* (2). In that case, the plaintiff in the former suit claimed the *chur* as an accretion to Rughoorampur which was dismissed, and, the subsequent suit for the same *chur* was brought for a declaration of the plaintiff's right to the settlement of it as an accretion to Mouza Lukhidia. It was held that the subsequent suit was barred as *res judicata*. In the course of the judgment, Sir Richard Couch referred to the decision of the Privy Council, in *Woomatara Debia's* case (3), and observed thus:—"In the present case the real question to be determined in the former suit was, whether the plaintiffs or the defendants were entitled to the *chur*: they might have shown that they became entitled to it by accretion to Rughoorampore or by accretion to Lukhidia. That would be only the mode of acquiring the title. Whether it is by accretion to the one or the other, there is no difference in the title. It is a title by accretion; and this was the question which was to be tried, whether the plaintiff had a title to the *chur* or the defendant? What their Lordships say is applicable

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Kishore
v.
Kristo
Chunder.*

(1) 7 *Suth. W. R.* 513. (2) 22 *Suth. W. R.* 464. (3) 11 *Beng. L. R.* 158.

to this case. It was open to the plaintiffs in the first suit to shape their case by proving that it was an accretion to Rughoorampore or to Lukhidia. If they did not attempt to show that it was an accretion to Lukhidia, they must, according to this judgment, take the consequences of it."

Dinobundhoo
v.
Kristomonee.

The principle laid down in the above case of *Kashee Kishore Roy* was referred to in the case of *Dinobundhoo Chowdhury v. Kristomonee* (1) by Sir Richard Garth, C. J. in the following terms:—"The only other authority which I think it necessary to notice, is that of *Kashee Kishore Roy Chowdhury v. Kristo Chunder Sandyal Chowdhury* (22 W. R. 464). The plaintiffs in that case had, in a former suit, laid claim to the land in dispute as being an accretion to an estate of theirs called Mouza Rughoorampore. In that suit they were defeated; and they then brought a second suit for the same land, describing it as an accretion to another estate called Mouzah Lukhichur, and the Court (Sir Richard Couch, C. J., and Ainslie, J.) decided that the plaintiffs were barred. They considered that the case was not distinguishable from that in the Privy Council, *Woomatara Debia v. Unnopoorna Dass* (11 B. L. R. 158), to which I have just referred; and I perfectly agree with them. The plaintiffs in that suit were not relying upon a different title from that which they set up in their former suit. In both suits they claimed the land in question as an accretion to other land, which was their undisputed property, and whether they claimed it as an accretion to one estate or another, or to one village or another, or to one field or another, they were in each case claiming it as an accretion to land of which they were confessedly in possession. The difference between the two suits was merely a matter of description, not of title."

(1) I. L. R. 2. Cal. 152 (169).

See also *Devraj Krishna v. Halambhai* (1) and *Haji Hasam Ibrahim v. Mancha Ram Kaliandas* (2), where the above case of *Kishee Kishore* have been referred to.

Where, in the decree of the previous suit for recovery of land as re-formation on the original site, the claim of the plaintiff in respect of a portion has been dismissed on the ground that so long as the order of the Superintendent of Diara Surveys remained in force, his claim to that portion must be considered either extinguished or in abeyance, a subsequent action in respect of the same portion as reformation on the site was held not barred by the principle of *res judicata*. In the case of *Kali Krishna Tagore v. Secretary of State* (3), the facts were shortly these.—The plaintiff and Muazzem Hossein were proprietors of the contiguous estates, *viz.*, Nazirpur and Saistabad, respectively. Sometime before 1842 considerable portion of these estates were diluviated by the Arial Khan. On the re-appearance of the land, in the shape of five churs separated from each other by *dones*, resumption proceedings were instituted by the Government but ultimately the churs were released. The lands assigned to the ancestor of Muazzem Hossein were named chur Chatua, and those released to the plaintiff's father, Gopal Lal Tagore, were called chur Gopalpur. Some years after, the river again changed its course, and flowing through Chatua and Gopalpur, washed away portions of these two mouzahs. After the last re-formation the land in dispute together with other lands was measured by the Diara Survey authorities in 1879 as excess lands of Chatua, as they were contiguous to the lands of Chatua. Muazzem Hossein objected to this, and claimed the land as re-formation on the site of the diluviated land of his mouzah

Kali Krishna
v.
Secretary of
State.

(1) I L. R. 1 Bom. 87.

(2) I L. R. 3 Bom 137.

(3) I. L. R. 16 Cal. 173.

Chatua. This objection being disallowed, Muazzem Hossein accepted a settlement of those lands from the Government as an accretion to his mouzah. The plaintiff who was not a party to these proceedings brought a suit for those lands claiming them as re-formations on the original site of his mouzah Gopalpur in 1881. In that suit an issue was raised—"whether the land in dispute is a reformation on the site of the plaintiff's chur Gopalpur, or on the site of the land of chur Chatua released to the defendant." The Court found this issue in favour of the plaintiff, but went on to say that so long as the order of the Superintendent of Diara Surveys remained in force and was not set aside "the plaintiff's right to that portion of the disputed land measured as surplus accretion to Chatua, and settled with the defendant must be considered as either extinguished or in abeyance. Consequently the plaintiff is not entitled to recover it now." The portion thus excluded from the decree was marked by the Court as D in the map. The plaintiff next filed the present suit (4th January) in 1883 against the Secretary of State and Muazzem Hossein and in this suit he claimed only the portion marked D in the former suit as re-formation on the site of his Zemindari. The suit was tried by the Subordinate Judge of Backergunj who gave a modified decree. Against that decree there was an appeal and cross-appeal to the High Court, The High Court considering the effect of the decree in suit of 1881 (which was affirmed by the High Court) said that the claim of the plaintiff in respect of the portion marked D in the map "was dismissed, that is to say, the relief prayed for by him in respect of it was not granted. What ever were the reasons which led the lower Court to take that course, and not to grant the plaintiff any relief in respect of that portion of the property, the decree as it stands constitutes the record of the rights of the

parties, and is the source that defines the limits of the estoppel arising from the proceedings. We can not look to the judgment as we were asked to do in order to qualify the effect of the decree.....it must be treated as a decree binding as between him and the 2nd defendant, the effect being that there is no claim against the defendant in respect of that property." In appeal to the Privy Council, with regard to the above passage, their Lordships said :—"Thus the High Court have given to the decree an effect directly opposed to what was intended by the Subordinate Judge, it being clear that he only intended to decide that the plaintiff was not then entitled to possession. The law as to estoppel by a judgment is stated in S. 6 of Act XII of 1879 and S. 13 of Act XIV of 1882. It is, that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree according to the Code of Procedure, is only to state the relief granted or other determination of the suit, The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgment is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the plaintiff is not entitled to the relief prayed for. It does not follow, as the learned Judges of the High Court think, that he can never have any claim against the defendant in respect of the property."

In the result, the subsequent suit of the plaintiff was held not barred as *res judicata* and a decree was passed in his favour by the their Lordships of the Judicial Committee.

Jagatjit Singh
v.
Sarabjit
Singh.

In the case of *Jagatjit Singh v. Sarabjit Singh* (1), a compromise decree was passed in 1873 in suits between the Raja of Kapurthala and Ramnagar, who owned villages on the opposite banks of the river Gogra. The terms of the compromise were to the effect that a "part of the alluvial land in dispute was to be attributed to Kapurthala's village, Tappa Sipah, according to the Revenue Survey Map; another part to be attributed to Ramnagar's villages, Para, and Deorya Tilkunia according to the same map; the remainder to be apportioned ratably to the villages above named." The area was judicially determined in 1876 on the map of 1874, but *actual possession was not obtained* by Kapurthala from the Raja of Ramnagar. A dispute arose in respect of the same alluvial land which as Kapurthala (the decree-holder) alleged, was through mistake mixed up with Tappa Sipah land. He, then, instituted a suit in 1877 including in his claim a part of the same land as an accretion to his riparian village, Khasapur, but that suit was ultimately dismissed. To get possession of the decreed land of 1873, Kapurthala, then brought two rent suits against tenants who were upon it. These suits were dismissed on the objection of the defendant after reserving the right to the plaintiff to establish his title in a competent Court. The Raja of Kapurthala next brought the present suit in 1886, upon a claim under the decree of 1873 including the land which he made part of the claim in the suit of 1877. As to the part which was included in the suit 1877, the Courts of India held that the claim of the plaintiff was barred by the principle of *res judicata*. On appeal to the Privy Council that view was overruled, and in delivering the judgment of the Judicial Committee, Lord Hobhouse said thus:—"Section 13 of the Civil Procedure Code (of 1884) does not enact that no property comprised in a suit which is

dismissed shall be the subject of further litigation between the parties. What it does enact is that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit, and has been heard and finally decided. Was then the title to Tappa Sipah land put in issue by the suit of 1877, and was it heard and finally decided against Kapurthala?" "Kapurthala claimed" continued his Lordship "a large area as belonging to Khasapur. Whether land belonging to Tappa Sipah was included in that area by mistake or in the hope of getting some advantage in the other dispute, does not appear. It must be remembered that far greater portion of these disputed lands is still uncultivated and jungle. Any how, the fact was discovered by a survey made in the suit of 1877; it appeared that doubts had been raised as to the position of the land decreed to Tappa Sipah; Ramnagar asked for an amin to point out, but Kapurthala preferred to have the suit decided first. The decision is that land not belonging to Tappa Sipah belonged to two of Ramnagar's villages, rather more, apparently, than two-thirds of the whole. But it is clear that the moment land was shown to belong to Tappa Sipah, it was considered as out of the suit. Both Courts treat it so, and both Courts direct Kupurthala to get the Tappah Sipah land ascertained. Their Lordships cannot see what matter respecting Tappa Sipah was in issue between the parties or what was heard or decided. It seems to have been the express intention of both Courts to decide nothing about Tappah Sipah. Yet, according to the view now put forward, the moment that this suit was dismissed Kapurthala was deprived of all right to recover those 1,266 bighas, and was incompetent to take the proceedings which the Courts contemplated."

The proposition of law which appears to have been laid down, in that case, by their Lordships is that a claim

which has been included in a previous suit, without its having been directly and substantially put in issue. and decided, does not upon the dismissal of that suit preclude a subsequent suit upon it.

ALLUVION AND DILUVION.

RELATING TO THE LAW OF LIMITATION.

Applicable to suits for Re-formed Land.

It is proposed to discuss, under this head, the special features of the law of limitation which are applicable to the cases which are to be governed by the provisions of Regulation XI of 1825. Before considering the bar of limitation, it would be necessary to ascertain what is *legal possession*. The possession of a rightful owner of "a mountain pasture may continue uninterrupted, although it remains unvisited for years." It is a principle founded in universal law and justice "that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner." (1) Applying this principle to the submerged land, it may be asserted at the outset that the *rightful* owner of the land continues to be in possession of it after diluviation and so long as it remains under water. His possession of it can not be put an end to during the period of submersion, so that the period of limitation can not run against the *rightful* owner before the reformation or reappearance of the diluviated land (See pp. 540-542 *ante*.)

Diluviated site continues in possession of the original owner.

The above view seems to have laid down by the Calcutta High Court, in the case of *Mano Mohan Ghose v. Mathura Mohan Roy* (2). In that case, it has been held that where the true owner is in possession at the time of diluviation, his possession is presumed to

Limitation runs against a true owner from the date of the dispossession after reformation.

(1) *Lopez v. Muddan Mohan*, 13 Moo. I. A. 467 (473).

(2) I. L. R. 7 Cal. 225.

continue so long as the land continues submerged and probably also afterwards until he is dispossessed. In this view, the period of limitation would run against the true owner only from the time of his dispossession.

he
presumption
of possession
arises only
in favour of
the true owner
and not of a
wrong-doer.

As to the significance of a *rightful* or *true* owner, reference may be made to the case of *Kali Churn Sahoo v. Secretary of State* (1). In that case, it has been held that where a person can show that he has been in possession of certain lands becoming diluviated, his possession must be considered as continuing during the time of diluvion, until such time as he becomes dispossessed by some other person. Referring to the facts of that case, it would be apparent that the Government at the time of diluviation were in possession only for four or five years and thus their right was not perfected by adverse possession, prior to the date of diluvion. It was, therefore, contended on behalf of the plaintiffs in that case that the possession of the wrong-doer came to an end when the land became diluviated. In overruling this contention, Sir Richard Garth, C. J. said :—" But their contention is, that if the Government were in fact wrong-doers whilst they remained in possession from 1865 till 1869, no presumption ought to be made in favour of their possession continuing after the land became diluviated, as if they had been the rightful owners. But it seems to me very difficult to act upon that principle. If the Government had merely committed a casual act of trespass, that would not have had the effect of permanently disturbing or discontinuing the plaintiffs' possession. But if what they did amounted to putting the plaintiffs, the true owners, out of possession, and they kept possession themselves under a claim of right for so long a period as four or five years, I see no reason why the fact of the land becoming diluviated should be considered as

putting an end to their possession. If this were the law, it would have a most important effect upon many titles in Bengal, which are founded upon adverse possession, because we all know that large tracts of land are always, more or less, covered with water during the rainy season; and if the fact of their becoming thus covered with water had the effect of putting an end to the possession of any person other than the true owner, and of restoring the true owner to possession during the time that the submersion continued, it would cause a very material change in the law of limitation."

"I think, therefore, that if Government were in possession under a *bona fide* claim of right at the time when the land became diluviated in 1869, their possession must be considered as continuing up to the time when they resumed actual possession, and therefore virtually up to the commencement of this suit."

The view thus expressed by Garth, C. J. practically laid it down that the possession of a person at the time of diluvion shall be presumed to continue during the period of submersion, irrespective of the fact whether such person is a *true owner* or *not*.

In fact, the above view was followed in this country in another case: see *Mahomed Ali v. Khaja Abdul Gunny* (1).

But the view expressed in the above case of *Kali Churn Sahoo* was evidently contrary to the well-known proposition of law that constructive possession can not be presumed in favour of a wrong-doer. So the decision was subsequently overruled by their Lordships of the Judicial Committee, in the case of *Secretary of State v. Krishnamani Gupta* (2). While delivering the judgment of the Privy Council, in that case, Lord Davey, referring to the decision in *Kali Churn Sahoo's case*, said:—"For

The decision in *Kali Churn Sahoo* overruled by the Privy Council in *Secretary of State v. Krishnamani Gupta*.

(1) I. L. R. 9 Cal. 744 : 12 Cal. L. R. 257,

(2) I. L. R. 20 Cal. 518 (1903) : 6 Cal. W. N. 677

the purpose of trying the question whether limitation applies, the Government must be regarded as a trespasser and dispossessor of the rightful owners, and in the opinion of their Lordships it would be contrary both to the principle and authority to imply such constructive possession in favour of a wrong-doer, so as to enable him to obtain thereby a title by limitation. In order to sustain a claim to land by limitation under the Indian Act, there must in their opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him. The possession of the Government was in fact determined by the submergence of the land which then became derelict and so long as it remained in that state, no title could be acquired against the true owner. Sir R. Garth, however, seems to have thought that in such a case the possession of a trespasser would continue, until the true owner resumed possession."

' Their Lordships can not agree in the view. On the contrary, they think that on the dispossession of the Government by the *vis major* of the floods, the constructive possession of the land was (if anywhere) in the true owners. In the case of the *Trustees, Executors and Agency Company v. Short* (1888, L. R. 13 A. C. 793), it was laid down by this Board that 'if a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place.' And the opinion of Park, B. is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the statute."

" Their Lordships think that for this purpose dispossession by *vis major* has the same effect as voluntary

abandonment, and they are of opinion that the case of *Kally Charan Sahoo v. The Secretary of State* was wrongly decided and ought to be overruled."

See also the observations of Mookerjee, J., on this point in *Amrita Sundari v. Serajuddin Ahmed* (1).

The decision, quoted above, therefore, establishes the proposition that the presumption of possession during submergence arises only in the case of the *true* owner at the time of diluvion.

Next, in regard to the presumption of possession of the diluviated land in favour of the rightful owner, reference may be made to the Full Bench decision, in the case of *Mahomed Ali Khan v. Khaja Abdul Gani* (2). In that case, Wilson, J., delivering the judgment of the majority, laid down the law in the following words:—"The true rule appears to us to be this: that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before the suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also until the contrary is shown. The presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in Section 114 of the Evidence Act."

Such presumption depends upon the circumstances of the case.

In the case of *Raj Kumar Roy v. Gobind Chunder Roy* (3), the plaintiff claimed the ownership of the land reclaimed from a *bheel* within the confines of two adjoining revenue paying mahals. In consequence of the nature and condition of the land there was no evidence of any act of possession exercised by either party during the first two years immediately preceding the date of the

(1) 19 Cal. W. N. 565 (577).

(2) I. L. R. 9 Cal. 744 (752): 12 Cal. L. R. 257.

(3) I. L. R. 19 Cal. 660.

institution of the suit, and during the last ten years the defendants had been in possession. The latter having tried and failed to establish adverse possession in themselves, contended that even if the plaintiff's possession were shown to have been existed in 1857, he could not succeed without showing that his possession remained till later than the 9th April, 1869, the suit having been filed on 9th April 1881. This contention was over-ruled and it was held that the presumption was in favour of the plaintiff's possession, which had been with apparent title, having in fact continued over the two years in question, as to which continuance there was no evidence to the contrary.

In this decision, their Lordships re-affirmed the doctrine which was enunciated in the concluding portion of the judgment of the Privy Council, in the case of *Runjeet Ram Panday v. Goburdhan Ram Panday* (1) to the effect that when there is conflict of evidence in a case, the presumption of possession goes with the title and that such presumption is not of any avail in the presence of clear evidence to the contrary.

Lessee not
affected by
trespass
against the
lessor.

*Gunga
Kumar
v.
Ashutosh.*

In the case of *Gunga Kumar Mitter v. Ashutosh Gossami* (2), the suit was brought by the plaintiffs on the 10th December 1888 for recovery of possession of three plots of lands on the allegation that they were reformations on the site of their villages K. and M, which were let out in *putni* and *dar-putni* in 1869; and that the rights of the *putnidar* and *dar-putnidar* were re-acquired by them in the years 1878, 1880, 1883. The defence was that the suit was barred by limitation.

It was held that as a grantor of a subordinate tenure was not bound to sue for trespass committed against his tenant during the continuance of the tenure, and as his right of action accrued when the tenancy came to an end, the suit was not barred by limitation.

(1) 20 *Suth. W. R.* 25 (29 & 30).

(2) 1. *L. R.* 23 *Cal.* 863.

The facts of the above case are not set out in the judgment explicitly. The principle of law which seems to be involved in the above decision is as follows.—Where during the continuance of a lease, a lessee is dispossessed by a trespasser, such dispossession would not be considered adverse as against the lessor, if he is in receipt of his rent. Limitation will run against the lessor only, at the time when the lease expires, so that he can bring the suit against the trespasser within twelve years from recovery of possession on the expiry of the lease. And if the land in possession of the trespassers is diluviated and the lease subsequently expires the lessor would be presumed to be in possession during the period of submergence.

The second part of the above proposition may be supported by the subsequent decision in the case of *Krishnamani Gupta* (1).

When the right of a trespasser is perfected by adverse possession before diluviation, his possession will be presumed during the period of submergence and not that of the original owner. This is obvious from the fact that at the time of diluviation, in such cases, the true owner in legal possession is the trespasser whose right has been perfected in the meantime. This view has been laid down by their Lordships of the Judicial Committee in the case of *Radha Prasad Singh v. Ram Coomar Singh* (2), where Sir. J. W. Colville, in delivering the judgment of the Privy Council, observed.—“The question was, who was entitled to the re-formation of the mouzah upon that site of Sreepore, upon this second re-appearance, their Lordships conceive that according to the strict doctrine in *Lopez's* case, if the plaintiff had previously to 1857 acquired the proprietorship of the land, it would be he and not the original owner of Sreepore who would be entitled to claim the benefit of that doctrine.”

Presumption of possession in favour of the trespasser when his right has been perfected before diluvion.

(1) I. L. R. 29 Cal. 518.

(2) I. L. R. 3 Cal. 796: 1 Cal. L. R. 259.

Presumption
is rebuttable.

In the case of *Madhabi Sundari Dassya v. Gaganendra Nath Tagore* (1), the Calcutta High Court has laid down that during the period when a piece of land is submerged under water, the true owners must be held to be in constructive possession, and when it reappears and does not become fit for actual enjoyment in the usual modes, it may be presumed that the previous possession continues until the contrary is proved. It may be further affirmed that the above presumption is rebuttable as has been pointed out in the Full Bench decision of *Mahamed Ali Khan*, cited before (see p. 619 *ante*), and also in the above case of *Madhabi Sundari Dassya*.

The rule of law relating to the presumption of possession after submergence in favour of the true owner at the time of diluviation has been discussed above. It, next, becomes necessary to consider the applicability of the Articles 142 and 144, that is to say, the articles dealing with the declaration of title and recovery of possession under the Indian Limitation Act.

Arts. 142 and
144 of Sch. II
of Act XV of
1877 and Sch.
I of Act IX
of 1908.

It may be premised at the out-set that in computing the period of limitation in cases of reformed lands, the time during which the land might remain submerged is immaterial, whether it be for twelve years or exceeding twelve years, in both the cases the land will be presumed to be in possession of the true owner, as have been stated above, and that the material point will be generally the date of reformation. If such date of reformation be within twelve years of the commencement of the suit, the question of "dispossession" or "discontinuance" of possession as contemplated by Article 142 of the Second Schedule of the Limitation Act (Act XV of 1877) and of the First Schedule of the Limitation Act of 1908 does not arise, as the plaintiff is presumed to be in possession during

the period of submergence. In such cases, the plaintiff has only to prove his possession at the time of diluviation, and that the land reformed within 12 years of the suit (1) (not necessarily actual physical possession within twelve years of the suit). Thus, it may be affirmed that if a suit is instituted for recovery of possession by the true owner of the land which has reformed on the original site, within twelve years from the date of reformation or re-appearance, or when the question of possession after reformation cannot be exactly determined (2), article 142 would not apply. Cases which are referred to below support this view.

In *Kali Churn v. Secretary of State* (3), it has been held by White, J., that the dispossession or discontinuance of possession, mentioned in article 143 Schedule II of Act IX of 1871 (corresponding to the above article 142) is that which occurs where the property is taken actual possession of by another and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation and actual possession. This was a case where the land in dispute had been a subject of a double diluviation and a double reformation. The site was at first diluviated before 1847, and it continued for some years under water, and reformed before 1863, upon the old site when Government took possession of it. Government next kept possession of the reformed land until 1869 when the site was again diluviated. In 1875 the land again reformed upon the site and was taken possession of by the Government. The plaintiff brought the suit in 1877. The period of limitation, in such cases as *White, J.*, at first intended to lay down, should begin to run from 1875. His opinion was evidently

(1) *Manomohan v. Mathura Mohan*, I. L. R. 7 Cal. 225.

(2) *Ibid.* p. 240.

(3) I. L. R. 6 Cal. 725.

based upon the view that, when Government took possession of the chur in 1865, it was a wrong-doer, and as such Government could not avail itself of the doctrine of constructive possession in order to connect its possession of the first re-formation in 1855, with its possession of the second re-formation in 1875, and its possession of the first re-formation was in fact swept away or put an end to by the second diluviation. The learned Judge subsequently resiled from that view when the appeal was re-argued and agreed in the view expressed by Sir Richard Garth in that case. But the decision of the Privy Council in *Krishnamani Gupta's* (1) case reversed the view of Sir Richard Garth, and in effect affirmed the former opinion expressed by White, J.

In cases of the above description, where diluviations and reformations take place several times, the possession of the original owner is presumed to continue, although a wrong-doer might take possession at every time of re-formation. Such a wrong-doer is not entitled to tack his possession of one re-formation with another. The principle that is to be applied to such cases is analogous to what has been laid down in the case of *Trustees, Executors and Agency Company v. Short* (2). In that case the Judicial Committee said:—"If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act...., to re-habilitate

(1) I. L. R. 29 Cal. 518.

(2) (1888) L. R. 13 A. C. 793 (798)

himself.....The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner or any secret process at work for the possible benefit in time to come of some casual inter-loper or lucky vagrant.'

The view laid down above was applied to India in the case of *Secretary of State v. Krishamani Gupta* (see pp. 617-618 *ante*.)

In the case of *Madhabi Sudnari Dassya v Gaganendra Nath Tagore* (1), the lands in dispute were formed by the recession of the river Karotoya and came into the possession of the Government in or about the year 1852 and were settled permanently, with the predecessors of the plaintiffs in 1853. The lands were again submerged and remained under water for a good long period. They re-appeared between the years 1866 and 1885. After re-appearance and before 1885, portions were cultivated by squatters who paid no rent to any zemindar. The defendants took possession of the lands adversely to the plaintiff in 1886, which was within twelve years of the commencement of the suit.

*Madhabi
Dassya
v.
Gaganendra
Tagore.*

With regard to the squatters, Geidt and Mitra, JJ., relying upon the decision in the case of *Watson v. Government* (2), held that a mere trespasser without claim of right as in the case of a squatter did not amount to an ouster of the true owner.

As to the point of limitation, the learned Judges said thus :—"The nature of the *chur* or *jungle* lands is peculiar and the mere cessation of possession cannot amount to discontinuance of possession, unless it is followed by the possession of another person in whose favour time would run. The plaintiffs who had the

(1) 9 Cal. W. N. 111.

(2) 3 Suth. W. R. 73 (75).

rights might not have been in actual possession, but there was no actual possession by another ousting the plaintiffs. The actual taking of possession of *chur* land by a person asserting a proprietary right, his causing a measurement and settling raiyats or assessing rent on the raiyats actually cultivating portions of the land generally indicate that the land or a large portion of it is fit for use in the ordinary way, and until then cultivation is precarious and uncertain and the same piece of land is seldom cultivated in successive years. Possession of the last kind can hardly be said to be effective in calculating the period of limitation. There was thus no dispossession or discontinuation of the possession of the plaintiffs within the meaning of Art 142 of the second schedule of the Limitation Act before 1885."

*Kumar
Basanta Roy
v.
Secretary of
State.*

In the case of *Kumar Basanta K. Ray v. Secretary of State* (3), the land in dispute appeared as an island in 1888, when the Government took possession of it as *chur* land surrounded by unfordable streams. The *chur* was unfit for assessment and cultivation till 1890. Further accretion on the north attached it to *Chur Raninuggar No. 1*. In 1889 it was first treated as an accretion to *chur Raninuggar* and *Jirat*, which had been released to *Suksagar Zemindars* as reformation *in situ* of their *mouzahs*, and then shortly afterwards came to be considered as an accretion to the part of *Chur Raninuggar No. 1*, which was a Government estate. It was under direct management of the Government in the *utbandi* system on yearly settlements in 1891-92. The area then producing rent was about 350 *bighas* and in the following year it was slightly more. It was regularly surveyed in 1894 and the *chur* was found to be 2,060 *bighas* of which 583 were by this time under cultivation, and the residue, as uncultivated jungle, but the

(4) I. L. R. 44 Cal. 585 : 21 Cal. W. N. 642 : 25 Cal. L. J. 489.

whole of it was under water from the beginning of June to the end of October. Naturally the land was then very poor and there was no resident tenant. The chur increased so far by 1894 that a raiyatwari settlement was then made with the *utbandi* raiyats for a term of five years. On the expiration of this term, it was again surveyed, and found to have increased to over 3000 bigha, of which a portion was released to the proprietor of estate No. 399 as being land which was a reformation *in situ* of his mouza Sardanga. It would seem that a further portion of it had been previously released to the owner of mouzah Baliadanga. The cultivable lands were then settled again for an undefined term.

In 1902, the principal defendants petitioned the Collector of Nadia for the release to them of the lands in question, alleging that they were reformation *in situ* of lands belonging to their estate, lot Gobindpur, Towzi No. 100, which was granted by the Collector. Accordingly they were put in possession of the whole of the lands.

The plaintiffs also preferred a similar application and but their application was refused. Thereupon they filed the present suit on the 6th September 1904. The Court of First Instance (Subordinate Judge, decided the case in favour of the plaintiff on questions of title and limitation. The High Court of Calcutta reversed the decision on appeal, in the case of *Gurudas Kundu v. Kumar Basanta K. Roy* (1), and it was held (per Chitty and Carnduff, JJ.) that the possession of the Government under the above circumstances was adverse to the plaintiffs since 1889 and that the suit was governed by Article 144 of Schedule II of the Limitation Act (xv of 1877). On appeal to the Privy Council, the decision of the Calcutta High Court was reversed. Lord Sumner in delivering the judgment of their Lordships

said thus :—"The Limitation Act of 1877 does not define the term "dispossession" but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession. constructively it continues until he is dispossessed ; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. 'There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment,' [per Cotton, L. J. in *Leigh v. Jack*, (1879) L. R., 5 Ex. D, 264 (274)]. It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one. the new owner's possession of course continues until there is fresh dispossession and revives as it ceases."

Next, referring to the decision in *Krishnamani Gupta's* case, (1) his Lordships observed,—“No rational distinction can be drawn between that case and the present one, where the reflooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner."

"Again", continued his Lordship "to apply the test suggested by Bramwell, L. J., in *Leigh v. Jack* (1879 L. R. 5 Ex. D, 264) at p. 273, 'to defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it' and therefore it is

(1) L. R. 29 I. A. 104 : 6 Cal. W. N. 617.

necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. 'It is impossible' says Lord Halsbury in *Marshall v. Taylor* [(1895) 1 Ch. 641 (645)] 'to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Cotton said in *Leigh v. Jack*, to the nature of the property.' An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely, acts which *prima facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object. In the present case beyond the temporary *utbandi* cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by Revenue authorities."

"Their Lordships are of opinion that, whatever may have been the case later on, there had not been, down to September 1892, any dispossession of the plaintiffs within the meaning of article 142."

With regard to the applicability of Art 144, their Lordships said thus:—"If, as their Lordships think, no dispossession occurred except possibly within twelve years before the commencement of this suit, article 144 is the article applicable, and not article 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendant."

Lastly as to the claim of right by adverse possession, their Lordships laid down thus:—"The period of time requisite to bring the defendants under the protection of article 144, cannot be made out, unless to the period

during which the defendants have been in possession there is tacked, out of the prior period when it is contended that the Revenue authorities had possession, a number of years going back to 1892. The definition section, 3 shows that in the present case this can not be done. The defendants do not derive their liability to be sued 'from or through' the Revenue authorities in any sense of the words. They advanced a claim of their own adversely to the Revenue authorities, which was rested on prior title and possession, and sought to put an end to conduct on the part of those authorities which, they asserted, was inconsistent with and an invasion of their own superior title. On investigation the Revenue authorities recognised and submitted to this adverse claim and withdrew from any enjoyment and occupation. If the defendants could make good now the claim which they made then, well and good but they would succeed, not by reason of, but independently of, the Limitation Act. Upon this ground they fail as far as article 144 is concerned."

Now, it has been stated before that Art 142 does not apply to a case where diluviation is followed by reformation, irrespective of the number of times during which such changes may happen, the theory of law being that the possession of the *true* owner continues. (See also p. 615 *ante*) The only article, therefore, that can possibly be applied is article 144. But, according to the view stated previously, the cases dealt with above having been instituted within twelve years of the date of reformation, they were not barred by that article.

It has also been said before that in such cases, it is not necessary for the *true* owner to prove his possession within twelve years of the suit, as the law of presumption of possession is in his favour (see pp. 619-620 *ante*). In other words, there is no onus upon the plaintiff in such cases to prove posses-

Suit for land reformed within 12 years, onus upon the defendant when he sets up the plea of limitation.

sion and dispossession within twelve years, which a settled rule requires the plaintiff to establish when the plea of limitation is urged by the defendant. It is a well-known rule of law that when a plaintiff comes into Court claiming a right, alleging possession and dispossession, the onus lies upon him to prove that such possession and dispossession took place within twelve years of the suit. See the cases of *Maharajah Kuwar Nitrasur Singh v. Babu Nanda Lal Singh* (1), *Paulurang Govind v. Balkrishna Hari* (2), *Nawab Nazir Sidh'e Ali Khan v. Woomes Chunder* (3) *Boolee Singh v. Harobuns Narain* (4), *Lall Singh v. Babu Madhusudan* (5), *Beer Chunder Jubraj v. Deputy Collector of Bhullooah* (6), *Busseeroonissa v. Raja Leelanuud* (7), *Gossain Das v. Seroo Kumari*; (8), *Lutchoo Khan v. Foley* (9), *Khola Newaz v. Brajendra Kumar* (10), *Mahim Chauder v. Mohesh Chunder* (11). These decisions establish that the onus is upon the plaintiff to prove possession within twelve years of the suit. But, in cases of reformations, where the plaintiff proves that the land reformed within twelve years of the suit, or when the question of possession just after reformation can not be definitely determine d, no such onus lies upon the plaintiff, except to prove his possession at the time of diluviation. When that fact is proved, the onus lies upon the defendant to prove that the land reformed before twelve years and that he has been in adverse possession for over twelve years, as has been laid down in the case of *Mau Mohun Ghose v. Mathura Mohan Roy* (12), where Field, J. in delivering his judgment, said :—" It appears to me that the principle to be gathered from these cases is, that although, according to

Exceptional
rule in suits
for reformed
lands.

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| (1) 8 Moo. I. A. 199 (220). | (2) 6. Bom. H. C. R. 125 (A. C. J.) |
| (3) 2 Suth. W. R. 75 (Civ.). | (4) 7 Suth W. R. 212. |
| (5) 8 Suth W. R. 426. | (6) 13 Suth. W R. 21 (P. C.) |
| (7) 14 Suth. W. R. 135. | (8) 19 Suth. W. R. 192. |
| (9) 24 Suth. W. R. 273. | (10) Ind. P. 417. |
| (11) I. L. R. 16 Cal. 473. | (12) I. L. R. 7 Cal. 225. |

the general rule, it lies upon the plaintiffs, who are met with the plea of limitation, to show their own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual and visible possession, yet that, from the nature of the thing, an exception must be made to this general rule in the case of property which is not susceptible of actual and visible possession."

That an exception to the general rule that the onus lies upon the plaintiff to prove possession and dis-possession within twelve years, is to be made in cases of suits for reformed land by the *true* owner, has been approved by the Full Bench decision, in *Mahomed Ali Khan v Khaja Abdul Gunny* (1), which held that the presumption of possession is in favour of the *true* owner unless the contrary is proved.

In the above Full Bench case, reference was made to the decision of the Privy Council in the case of *Radha Gobind Roy v. English* (2). In that case, the land in dispute formed part of the bed of a *bheel* or lake, the title to which was found to be in the plaintiff. He had been in possession so long as the land was covered with water. The *bheel* gradually dried up and the defendant occupied the land so formed. The plaintiff proved, *prima facie*, his title to the *bheel* and possession of it in one of his ancestors, but he gave no proof of acts of ownership within twelve years before the suit. The dates of the drying up of the land and of its occupation by the defendant were in controversy, although some lands were found to be of recent formation and the defendant failed to prove possession of the land for twelve years before the suit. It was held by the Privy Council that under these circumstances, the plaintiff had proved a title to, and possession of,

(1). I. L. R. 9 Cal. 744 ; 12 Cal. L. R. 257 (F. B.).

(2) 7 Cal. L. R. 364.

the *bhuel*, his possession must be presumed to have continued, unless the defendant could make out a twelve years' statutory title by adverse possession and that the onus to prove such possession was upon the defendant.

In the case of *Mahomed Ibrahim v. Morrison* (1), where the question of limitation arose regarding *chur* lands gained by the recession of a river, Mitter, J., in delivering the judgment, in connection with the exception to the general rule of the onus upon the plaintiff, observed thus :—“It is a settled rule of law in this country that, whenever the plea of limitation is raised, it is for the plaintiff to show *prima facie* that the cause of action upon which he is suing is not barred by limitation. But the case of a *chur* land has been said to be an exception to this rule, and the reason suggested for this exception is, that *chur* lands during the first few years of their existence are generally not cultivable. To a certain extent this contention seems to us to be correct. Where limitation is pleaded to a suit, the subject matter of which is *chur* land not brought under cultivation, it is for the defendant before he can succeed in his plea, to establish that he has exercised adverse rights of ownership over the disputed land for more than twelve years.”

In *Hur Sahai v. Mahomed Daim Khan* (2) the High Court for that N. W. Provinces held that, where in a suit the plaintiff claimed land on the allegation that it belonged to his village but remained submerged at the time of the settlement, and succeeded in showing that the submerged land was identical with the land which had since been left dry, his suit would not be barred by limitation unless it could be shown that some other person had been in adverse possession for twelve years

(1) I. L. R. 5 Cal. 36 (37-38.)

(2) (1867) 2 N. W. P. H. C. Rep. 64 or (2 Agra R. p. 64)

before the plaintiff preferred his claim and that such possession had commenced from the time when the plaintiff was in a position to dispute it.

Onus upon
the plaintiff to
prove
possession at
the time of
diluviation.

The decisions which have been referred to above establish the proposition that the onus to prove the plea of limitation is upon the defendant in suits for lands which reform within twelve years of the suit, and that the plaintiff in such cases has only to prove his possession at the time of diluviation. But, if the plaintiff fail to prove his rightful possession at the time of diluviation or at any time subsequent to reformation provided that such latter time be within twelve years from the date of the suit, his suit is to be dismissed on the ground of limitation, as was held in the case of *Gokool Kristo Sen v. David* (1), where the bar of limitation was urged by the defendant in a suit for church lands, claimed by the plaintiff as reformation on the original site of the plaintiff's or his vendor's land. On the question of limitation, in that case, the Subordinate Judge was of opinion that the defendants, not having been able to establish an adverse possession for more than 12 years, the plaintiff's suit was not barred by limitation. On appeal that decision was reversed and Mitter, J., in delivering the judgment, said thus:—"According to the plaintiff's allegation, he must prove that the land in dispute before it diluviated or disappeared was in the possession of his vendor. Unless he should prove this fact, his claim would not be saved from the operation of the Law of Limitation, because, according to his own case, the lands reappeared for the first time in the year 1271, and he has not established that, after their reappearance, he or his vendor has been in possession for a single day. That being so, unless he should prove that, at the time of the disappearance of the land in dispute he or his vendor was in possession,

(1) 23 Suth. W. R. 443.

it could not be said that his cause of action accrued within 12 years from the date of the institution of the suit. If that fact had been proved, no doubt he would have been entitled to say that, when the land was under water, his possession over it could not have continued; and that, when it reappeared, he having been prevented from taking possession by the defendant, the cause of action for this suit then arose."

It has been said before that in suits for recovery of land which re-forms within 12 years from the commencement of the suit or when such dates of reformation and occupation by the defendant are in controversy and cannot be definitely determined from the facts proved, the onus is upon the defendant to establish his plea of limitation. Now the question is, who is to prove that the land reformed within 12 years from the date of the suit, in other words, at what stage such onus is to be thrown upon the defendant. The answer apparently seems to be this that the plaintiff would have to prove *prima facie* that the land reformed or was in unculturable state within 12 years from the date of the institution of the suit and that he was in possession at the time of diluviation, in order to shift the onus upon the defendant to prove the bar of limitation. This view appears to have been laid down in *Mahomed Ibrahim v. Morrison* (1), where, Mitter, J., in continuation of the portion already quoted at page 663 *ante*, observed:—"But when the suit relates to a peice of chur land already brought under cultivation, the plaintiff in order to get over the plea of limitation, must at least establish that either the land in suit formed within twelve years or was not in a fit state of cultivation within that period. Otherwise in all cases where the plaintiff shows that a subject-matter of a particular suit was chur in unculturable state sometime previously,

Onus to prove reformation within 12 years or that reformed land was not in a fit state of user, is upon the plaintiff.

(1) I. L. R. 5 Cal. 36.

however remote it may be, or even a century before, it would be for the defendant to establish the plea of limitation by proving adverse possession for more than twelve years. This latter rule may seem more reasonable or consonant to justice, but the whole current of decisions being for a very long time in the other way, it is now too late to adopt it."

In *Mano Mohun v. Mathura Mohun* (1), the above view was approved, and while referring to that case in his judgment, Field, J., observed — "In the case of *Mahomed Ibrahim v. Morrison*, (2) reference was made to a class of cases which supported the proposition that when limitation is pleaded in respect of lands, which are either in a jungly or unculturable state, it is for the defendant to establish his plea by proving adverse possession for more than twelve years, and it was held, that that proposition could not be applied to land brought under cultivation. but that, in the latter case, the plaintiff, in order to get over the plea of limitation, must at least establish, that either the land in suit formed within twelve years or was not in a fit state of cultivation within that period."

Condition of the land determines whether Arts. 142 or 144 applies where land reformed before 12 years of the suit.

Next, if the land reforms before twelve years from the date of the suit, whether article 142 or article 144 is to be applied, would depend upon the circumstances of the case. If the reformed land continues to be in a condition unfit for actual enjoyment in the usual modes or other acts of possession till within twelve years of the suit, the possession of the *true owner* will be presumed until the contrary is shown as pointed out by the Full Bench decision in the case of *Mahomed Ali Khan v. Khajah Abdul Gani* (3). The decision of that Full Bench was applied to the case of *Mohini Mohan Das v. Krishna Kishore*

(1) I. L. R. 7 Cal. 225.

(2) I. L. R. 5 Cal. 36.

(3) I. L. R. 9 Cal. 744 : 12 Cal L. R. 257.

Dutt (1). In that case it was found by the Court of Appeal below (Subordinate Judge) that the land in dispute emerged from the water previous to twelve years from the date of the suit, and that no act of possession was proved by the plaintiff from that time. The Court of Munsiff held that the land was waste and did not become fit for cultivation until within six or seven years before the suit. This finding of the Munsif was not reversed by the Subordinate Judge in appeal, and he dismissed the plaintiff's suit holding that no presumption could be made in favour of the plaintiff who must prove possession by acts of ownership within twelve years. In second appeal, this decision was set aside and it was held that the plaintiff's possession must be presumed to have continued until the contrary was shown.

In that case, it was also held that the exercise of the right of ownership by letting out the julkur to tenants would be *prima facie* evidence of possession of the land under water, unless such right was referable to a different title.

A similar view as to the presumption of possession in favour of the true owner in respect of the land which reformed before 12 years of the date of the suit but continued in a condition unfit for cultivation had also been held in the case of *Madhabi Sundari Dassya v. Gaganendra Nath Tagore* (2). In the concluding portion the judgment, Geidt and Mitra, JJ., said:—"In the present case though the land reformed more than 13 years before the commencement of the suit, there is no finding in the judgment of the learned Judge as to who, if any, was in possession immediately before the commencement of the adverse possession of the defendants. If it is proved that there was no one in possession

(1) I. L. R. 9 Cal. 802 : 12 Cal. L. R. 337.

(2) 9 Cal. W. N. 111 (116).

claiming a title against the plaintiff, during the interval, the possession of the plaintiff, must be considered to continue. If the state of things, as existed before 1885 continued until the defendants took possession, no bar of limitation can, as we have seen, be set up against the plaintiffs." (See pp. 625 626 *ante*.)

In view of the above decisions which have been passed, having regard to the nature of the land immediately after the reformation, although such event might have happened before 12 years from the date of the suit, it would seem reasonable to hold that article 144 would apply to such cases, and that the onus to prove the plea of limitation is upon the defendant as in the case of land which reforms within 12 years of the suit, (see pp. 631-634 *ante*.)

Cases where
Art. 142 was
held
applicable.

As to other cases of land which reforms before 12 years preceding the institution of the suit, where the question of the nature of the land as referred to above does not arise, it would seem clear that article 142 would be applicable to such suits and the onus to prove possession and dispossession within twelve years of the suit would be upon the plaintiff. If he fails to discharge such onus his suit will be dismissed. It would not be sufficient for the plaintiff, in such cases, to prove possession only at the time of diluviation. The decisions which are discussed below support that view.

In the case of *Kumar Runjit Singh v. Schoene, Kilburn* (1), the plaintiffs claimed the land in dispute as reformation on the old site of their estate. The defendant set up the plea of limitation alleging that land reformed more than 12 years ago, and that they had been in possession for that period. The trial Judge dismissed the plaintiffs' suit, holding that the plaintiffs' suit was barred by limitation, as the plaintiffs failed to prove that any part formed within 12 years of the suit. On ap-

peal to the High Court that decision was affirmed and it was held that the plaintiff in order to succeed, must, according to the rule laid down in the case of *Maharaja Koonur Netrasur*, 8 Moo. I. A. 199, (220), prove satisfactorily that the defendant has not been in possession for the period of twelve years next preceding the commencement of his suit. In this case, it should be observed that the plaintiff excluded the presumption in his favour by alleging that the land was capable of cultivation and that he grew Khesari upon it.

In that case, it was further held that where the evidence was not sufficient to support an affirmative finding that the whole of the lands claimed had reformed within twelve years preceding the institution of the suit, it was incumbent on the plaintiff to show specifically the portion, if any, which had reformed within 12 years, and that the Court could not undertake to divide the portion of land which might have been reformed within 12 years from the large part which evidently reformed more than 12 years ago and had been in the adverse possession of the defendants.

The view laid down in the above case was subsequently applied to the facts of the case of *Guru Das Kundu v. Kumar Basant Roy* (1). But, in appeal to the Privy Council, in *Kumar Basant Roy v. Secretary of State* (2), the decision in *Gurudas Kundu's* case was reversed. It appears from the report of the case that decisions in *Kumar Runjit Singh's* case was cited before their Lordships as being a decision under the old Limitation Act, and it was also relied upon in the judgment of the Calcutta High Court. But nothing has been said regarding that case in the judgment of the Privy Council.

In the case of *Mahima Chundra Mazumdar v.*

(1) 14 Cal. W. N. 317 : 11 Cal. L. J. 373.

(2) I. L. R. 44 Cal. 858 : 25 Cal. L. J. 487.

*Manima
Mazumdar
v.
Mahesh
Neoghi.*

Mahesh Chunder Neoghi (1), the nature of the lands in dispute which has not been described in the judgment of the Privy Council, may be stated as follows.—The mouzahs of Rajapur and Machuakandi were contiguous, with the river Ichamati flowing between them. In 1844 the latter mouzah was diluviated and on the recession of the river land reformed on the old site. This land was resumed by the Government and afterwards measured and assessed as part of Machuakandi. The proprietors of Rajapur, however, claimed the reformation as part of their mouzah and on the 31d August, 1846, the whole of the lands, measured and assessed as appertaining to Chur Machuakandi were released to the proprietors of Rajapur as accretion to it. Sometime before 1861, raiyats were settled in this disputed land. According to the defendants' evidence, the cultivators and tenants all came from Machuakandi. It was admitted by the plaintiffs that from the month of September 1874, the defendants had refused to acknowledge the right of the plaintiff as proprietors. In respect of a portion of the disputed land there were proceedings by the Magistrate under section 530 of the Old Code of Criminal Procedure in 1882. The plaint was filed on 30th July 1883 by the plaintiffs, the owners of Rajapur claiming the land as part of their mouja. The defendants, the owners of Machuakandi set up the bar of limitation under Art. 142 of Sch. II, Act XV of 1877.

From the statement of the facts of the case taken from the report, it seems clear that the land in dispute had become fit for cultivation or other useful purposes since before 1861 and the suit was brought in 1883. The Subordinate Judge who tried the case at the first instance, upon the evidence came to the conclusion that the plaintiffs had acquired title to the land in dispute as accretion to their ancestral mouja Rajapur and were ir

(1) I. L. R. 16 Cal 473. L. R. 16 I. A. 23.

possession of it since 1848, and their possession was upheld by the Revenue Survey in 1858, and though they were dispossessed from the greater part of the land in 1875, yet they retained part of them, till ousted by the Criminal Proceedings of 1882. He was of opinion that the plaintiffs, as he found, were the rightful owners of the disputed lands and it was for the defendants to show that they were entitled to retain them. The decree of the Subordinate Judge was reversed by the High Court in appeal, and on appeal to the Privy Council, the decision of the High Court was affirmed.

In regard to the view relating to the onus upon the defendant as held by the Subordinate Judge, their Lordship said :—"That, as a proposition of law, is one which hardly meets with the approval of their Lordships."

"This in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *a fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed and at sometime within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875 or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed."

It was thus held in this case that the burden of proving the dispossession or discontinuance of possession within 12 years as prescribed by Art. 142 of Sch. II of Act XV of 1877 was upon the plaintiffs, although he proved an anterior title to the land in dispute.

It would seem that the above decision of the Priyy

Council was distinguished in the case of *Madhabi Sundari Dasya* (1), as the lands in dispute, in that case, were incapable of ordinary acts of possession or actual user and continued to be so until within 12 years of the suit.

*Rani
Hemanta
Kumari
v.
Maharaja
Jagadindra
Roy.*

The above decision was re-affirmed by the Privy Council, in the case of *Rani Hemanta Kumari Debi v. Maharaja Jagadindra Ray* (2), where the suit related to alluvial land adjacent to the Brahmaputra River. The decision of the appeal before the Judicial Committee turned upon the determination of the point of limitation. Lord Robertson, who delivered the judgment after reciting the title of the appellant in the case, proceeded as follows :—"The case of the Respondent is rested on possession. Even on the showing of the appellant, the Respondent at the date of the plaint had been in possession for eleven years, and the Respondent says for twelve years (the period of limitation) and longer. The difference between the admitted possession and the period of limitation being so narrow (one year) the the question of *onus* is important, and their Lordships adhere to the principle stated in the Privy Council case cited by the learned Judges in the High Court [*Mohini Chunder Mozoomdar v. Mohesh Chunder Neoghi*, L. R. 16 I. A. 23], and hold that it is for the appellant, as Plaintiff in a suit for ejectment, to prove possession prior to the dispossession which she alleges. At the same time, their Lordships consider that in this question of evidence the initial fact of the Appellant's title comes to her aid, with greater or less force according to the circumstances established in evidence."

In this view, it would seem that Art. 142 of Sch. II of the Limitation Act (XV of 1877) was applied to that case, and that the onus to prove dispossession or discontinuance of possession within 12 years of the suit was thrown upon the plaintiff,—appellant.

(1) 9 Cal. W. N., 111 (114).

(2) 10 Cal. W. N. 630.

In *Bilash Chandra Mukhopadaya v. Amjad Ali Patwari* (1), the suit was for declaration of title to and recovery of possession of chur lands which had been diluviated more than twelve years before the suit, and the plaintiffs proved their title and possession up to the time of diluviation and alleged that the disputed lands had reformed within twelve years of the suit. The defendants, on the other hand, alleged and it was found that the lands in question came into existence 30 years ago and had been gradually forming since then. How much was formed yearly and whether the chur was fully formed in five years could not be determined. Upon these facts it was held by Jenkins, C. J. and D. Chatterjee, J. that the case would be governed by Art. 142 and not Art. 144 of Sch. II of the Limitation Act (XV of 1877)

Applicable to suits for land gained by Accretion or Avulsion :—

In relation to suits for land gained by accretion, it may be affirmed at the outset that the application of the Law of Limitation is restricted by two considerations, namely, *first*, by the nature of the right which a riparian owner acquires to the accreted land, according to the provisions of the Regulation, and *secondly*, by reason of the rules for assessment of revenue in respect of such accreted land. According to the provisions of the Regulations, the riparian owner acquires a title to the accreted land co-extensive with that already possessed by him in the main land, subject to the payment of additional revenue under the rules framed for the purpose by the Revenue Authorities. If he refuse to submit to such assessment, his right to the ownership of such land continues and it is recognized by the reserving of *malikana* for him. The rule of *malikana* preserves his proprietary right (2). The Revenue

Law of
Limitation
relating to
suits by the
recusant
proprietor.

(1) 9 Indian Cases 554.

(2) See pp. 294-300 *ante*.

Authorities, in such cases, make temporary settlement of his accreted land with some other persons. The fact of his being out of actual possession on account of such temporary leases is not calculated as having the effect of putting the law of limitation in operation against him and the possession of such settlement-holder is not considered adverse to that of the riparian owner. This view is apparently maintained by the decisions which are cited below :—

Limitation does not run against a true owner of the riparian estate when the accretion to it is in possession of another under temporary leases from the Revenue Authority on his refusal to accept that settlement.

In the case of *Mussummat Sunduloo-nissa v. Georoo Pershad* (1), it was proved that the portions of the new chur claimed by the plaintiff were within the limits of the share held by him in the parent estate, and that after accretion and before resumption proceedings, the ground was in his occupancy. It was held that the statute of limitation can not apply to extinguish his right, because of the disposssession while these proceedings were pending and that it could run against him from the date only of the close of those proceedings. It was further held in this case that the Special Commissioner's view could bind the Civil Court on the question only of liability to assessment and not in other rights.

In *Cally Chunder Chowdhury v. Monikurnika Chowdhurani* (2), the plaintiff's suit was for establishment of his right to exclusive settlement of lands contiguous to his original estate, which were given to the defendants in temporary leases and were in their possession for over 12 years. It was contended in this suit that the claim of the plaintiff was barred by limitation. This contention was overruled. Steer, J. in delivering the judgment, said :— " We think that, during the time that the estate was under the management of the Collector, and as one mode of management under temporary leases, that the rights

(1) 1859 Cal. Sud. D. Rep. 470.

(2) 1864 Suth. W. R. (Gap. No.) 149.

of the parties to the permanent settlement of the lands does not become extinguished by any length of time. It may be leased out over and over again, and, notwithstanding that from the date of the first lease more than 12 years may have expired, that fact would not bar the right to settlement of any party who, under the law of alluvion, has the right of settlement. It is true that the present plaintiff might have sued whenever he felt so inclined to establish his right to be regarded as the proper party, or one of the proper parties, to whom the right of settlement belonged. But he was not bound to sue, for, during a temporary settlement, rights of parties are not extinguished, but are only kept in abeyance."

The view, laid down in the above case, was followed in *Bissessuree Dasi v. Kali Kumar Roy* (1). In that case, one co-sharer who managed the property, and, in the absence, or during the minority of the other co-sharer, obtained from the Collector a temporary settlement in his own name of *chur* lands accreting to the parent estate. It was held by Kemp and Glover, JJ., that the latter was entitled to participate in the temporary settlement, and that the possession of the former was not adverse to the latter.

In the case of *Kristo Chunder Sundyal v. Kashi Kishore Roy* (2), which was a suit for a declaration of the plaintiff's right to a share in the settlement of an accretion, the land was resumed by Government in 1835, and let out in temporary leases till 1867, when a permanent settlement was made with the defendant. It has been held by Bayley and Markby, JJ., that the period of limitation which bars the claim to a settlement does not begin to run so long as the proprietary right of the zemindar is formally recognized by the

(1) 18 Suth. W. R. 198.

(2) 17 Suth. W. R. 145.

Revenue Authorities by temporary settlements, and no permanent settlement is made with any other person.

It has been further held, in that case, that the payment of *malikana* is not the only method in which a proprietary right can be recognized, but the keeping of the *malikana* in deposit, as in that case, for the benefit of the recorded proprietors generally is a sufficient recognition of a sharer's proprietary right.

Possession by the Collector is not adverse to the true owner.

The view that, in cases of temporary settlements of an accretion with a person other than the riparian owner to whose estate it is annexed, the right of such owner to such land is not extinguished but kept in abeyance, has been upheld in *Krishto Chunder v. Shama Sundari* (1). In that case, it has been held that adverse possession against the riparian owner begins from the date on which the permanent settlement is made with a third party.

In the case of *Sarat Sundari v. Secretary of State* (2), the lands in dispute accreted to the estates of the plaintiffs and their co-sharers, and they were assessed with additional revenue. The proprietors of all the nine mahals to which the lands were found to have accreted were invited to accept the settlement, but the settlement was made with only two or three, as the other proprietors for whom *Malikana* was subsequently reserved refused to take the settlement. Under this state of things, it was held that the Government not having intended to set up a proprietary right to the land in dispute as proved by the fact of temporary settlements, the question of limitation did not arise.

In *Guroo Churn Dutt v. Krishna Moni Gupta* (3), it has been laid down in the concluding portion of the judgment that if a party be in possession under temporary leases from the Collector, such possession would

(1) 22 Suth. W. R. 520.

(2) I. L. R. 11 Cal. 784 (787).

(3) 2 Cal. W. N. 315.

not be adverse to the true owner, for whom it must be supposed that the Collector was holding the land.

Karan Singh
v.
Bakar Ali.

The view that the possession of the Collector is not adverse to the true owner has been laid down by their Lordships of the Judicial Committee, in the case of *Karan Singh v. Bakar Ali Khan* (1), where the question was whether the defendant could tack or add his possession to the possession of the land in dispute held from 1861 to 1863 by the Collector under attachment for the protection of the Government Revenue, so as to establish that the plaintiff was never in possession of the land in dispute within 12 years of the suit, which was brought in 1874. While pointing out the distinction between the Limitation Act of 1859, and the Limitation Act of 1871 their Lordships said:—"It was contended that the plaintiff must prove that he was in possession within the period of twelve years, but when their Lordships came to consider, the present law of limitation, they find that that is not correct. It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action; but under the present law, it may be brought within twelve years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff. His possession since 1863 was not twelve years' possession; but it is contended that he was justified in adding or tacking, to his possession the possession of the Collector from 1861. Their Lordships must assume that the Collector properly took possession for the purpose of protecting the Government revenue. It was the duty of the Collector, whilst in possession under the attachment, to collect the rents from the ryots, and having paid the Government revenue and expenses of collection, to pay over the surplus to the real owner. If the defendant was the real owner the

(1) I. L. R. 5 All. 1.

surplus belonged to him ; but if, on the other hand, the infants were the right owners, then the surplus belonged to them The Collector, by paying over the money to Karan Singh, did not give Karan Singh a title "

"Although the Collector" continued then Lordships "gave up possession of the estate and paid over the surplus proceeds to Karan Singh that did not show that he was holding for Karan Singh. The defendant does not claim through the Collector, and he cannot add to his possession from the year 1863 the possession of the Collector from 1861 to 1863 "

See also *Bheema v Pahlad* (1) and *Ramaisher Singh v. Saiva Zalim Singh* (2).

Adverse possession begins to run from the date when the settlement is made permanent.

The decisions, cited above, establish that the possession of the party, with whom the settlement may have been made of the accretion by the Revenue Authorities on the refusal of the owner of the riparian estate to which it is annexed to take the settlement, becomes adverse to such owner from the time when such settlement is made permanent, (see pp 644-646 *ante*.)

Possession by the Collector holding *khas* until a new settlement is made, is not dispossession of the former talookdar.

In this connection, reference may be made to the case of *Moulvi Mynooddeen v Ram Mouee Chetvadhurani* (3), where the question was, whether, when a dependent *talookdar*, holding under a temporary settlement, has that settlement placed in abeyance by the fact of the Collector taking the collections into his own hands *khas*, the Collector's act is one of dispossession from which the period of limitation should be calculated, or whether it should be from such date when the purchaser at a sale, after the Collector had ceased to hold *khas*, had himself made collection, and so created a cause of action by dispossession of the former *talookdar*. It was decided that the Collector's act was not one of disposses-

(1) 1867 N. W. P. II. C. Rep Vol II p 38. (2) *Agia Report* 35.

(2) *Ibid.* 8.

(3) 7 *Suth. W. R.* 182.

sion from which limitation could be counted and that the dispossession by the purchaser only could have given a cause of action.

It has been said before that the recusant proprietor is entitled to *malikana* which keeps alive his proprietary right in respect of the accretion to his riparian estate (see p. 289 *ante*), and that the period of limitation does not begin to run against the owner of the parent estate, so long as the accretion is not settled permanently with a third party. Now a question arises, what would be the rule of limitation applicable to suits for recovery of such *malikana*. At one time it was thought proper to argue that *malikana* is in the nature of rent, forming constantly a recurring cause of action. But this view has been reversed and it has been held that it is an interest in immovable property and that the last payment, in order to save the period of limitation, must be proved to have been made within 12 years of the suit under the Limitation Act of 1859 (being Act XIV of 1859). This view of law is apparent from the following cases.

Limitation applicable to suits for *malikana* payable to the recusant proprietor.

In the case of *Mussumut Ocerum v. Baboo Heeramund* (1), the plaintiff's claim was dismissed, as the last payment was not proved to have been made within 12 years.

In *Heeramund v. Mussumut Ocerum* (2), it was held that the right to *malikana* was a proprietary right constituting an interest in land and not the same as rent and that a suit for recovery of it would be barred if no enjoyment of it is established within 12 years of the suit.

In the case of *Budurul Hug v. The Court of Wards* (3), where the claim to *malikana* was allowed to lie over and not enforced for more than 12 years of the suit, it was held that such claim was barred by limitation.

(1) 7 Suth. W. R. 336.

(2) 9 Suth. W. R. 102 (civ.).

(3) 10 Suth. W. R. 302.

In *Bhourlee Singh v. Mussamut Neemoo* (1), it has been held that *malikana* is not rent, nor has it the element of rent. It is a right to receive a portion of the profits of the estate for which the Government have made a settlement with another person, the real proprietor having neglected to come in and make settlement. It is an interest in immovable property and the suit to collect it would be barred, if it has not been received for a period of 12 years.

In the case of *Mussamut Beebee Chummun v. Mussamut Om Koolsoom* (2), the rule of law laid down by the Privy Council that a person entitled to an interest in immovable property loses, not only all remedy, but his title, by being out of possession for more than 12 years, was held to apply to the case of a recusant proprietor claiming *malikana*.

The decisions, cited above, were followed in *Gobind Chunder Roy v. Ram Chunder Chowdhury* (3), where it was held that *malikana* was an interest in land and the right to recover it ceased when it was left as an unclaimed deposit in Collector's hand for over 12 years.

In the case of *Kristo Chunder Sandel v. Shama Soondaree Debia* (4), following the above decisions it has been held that where *malikana* is in deposit with the Collector on behalf of proprietors who have refused settlement, the proprietors would lose their right to recover it if they do not claim it for more than 12 years.

See also *Gopi Nath Chobey v. Bhugvat Pershad* (5), where the claim to *malikana* was held to be barred by limitation, as being governed by Arts 120, 131 or 144 of the Limitation Act (Act XV of 1877).

So long the rules of limitation applicable to suits by a recusant proprietor, that is, a proprietor who refuses

(1) 12 Suth. W. R. 498

(2) 13 Suth. W. R. 465.

(3) 19 Suth. W. R. 94 (civ).

(4) 22 Suth. W. R. 520.

(5) I. L. R. 10 Cal. 697.

to take settlement from the Government of any alluvial land which accretes to his estate, have been discussed. It is, next, proposed to deal with the rule of limitation which is to be applied to suits which may be brought when the Government refuses to engage for such land with the proprietor of the parent estate, and settles it permanently with a third party. In such cases, the orders of the Revenue Authorities will be considered as an award according to the provision of the following Regulations of the Bengal Code, *viz.*, Regulation VII of 1822, Regulation IX of 1825, and Regulation IX of 1833; and they would therefore come under Art. 45 of Schedule II of Act XV of 1877 corresponding to Art. 45 of Schedule I of Act IX of 1908. The period of limitation within which a suit for declaration of the right to a settlement is to be brought seems to be three years according to the provision of that article. In the case of *Bheekoo Singh v. The Government* (1), where in a suit instituted by an ex-lakhtirajdar, whose claim for recognition of the right to settlement on the ground of being an ex-proprietor was rejected by the Government, it was held that the order of rejection could only be set aside by a suit brought within three years of that time.

Special rule
of Limitation
when
Government
refuses to
make
settlement
Art. 45 of
Sch. I of Act
IX of 1908.

The word 'award' in that article means a judicial award and not a determination by the Revenue Courts of a purely executive character, *Kristamoni v. Secretary of State* (2). The position which makes the above article applicable to a case may be stated as follows in the words of Morris, J.:—"If, however, at the time when the Collector took action under Regulation VII of 1822, in respect of those lands or of a portion of them, the plaintiff claimed them as portion of his settled estate, and claimed to have a right to settlement of them 'with him, the Collector rejected his claim, his right to bring a

(1) 10 Suth. W. R. 296

(2) I. L. R. 29 Cal. 518 (526); 3 Cal. W. N. 99 (105).

suit to contest that rejection would, in our opinion, be limited to three years from the date of such order, or from an order of a superior authority, such as the Board of Revenue, rejecting his claim," (1) It would therefore seem clear that the refusal by the Revenue Authorities to make settlement with a party must be by an order after necessary inquiries which would be appealable to the Board of Revenue, in order that the special rule of limitation for three years may be applicable to such a case. The decision of the Calcutta High Court in the case of *Abdul Kadir v. Hamdu Miah* (2) is apparently consistent with that view. In that case, it has been laid down (*per* Stephen and Holmwood, JJ.) that a suit to set aside an order of the Commissioner refusing to make a settlement of khas mahal land with the plaintiff who claimed settlement of it as an accretion to his jote is governed by Article 45 of Schedule II of the limitation Act (XV of 1877) and not by Art. 14. There, the plaintiff asked for a settlement of the land in dispute as an accretion to his jote, and the Collector gave him the settlement. On appeal to the Commissioner the order of the Collector was set aside and the land was settled with the defendant. Under these circumstances, it was held that the order of the Commissioner was one under Regulation IX of 1825 and that article 45 was applicable.

The rule of limitation laid down by that article would not apply if the plaintiff in the suit was not a party to the award, *Kanto Prosad v. Asad Ali* (1).

special rule
Limitation
of three
years under
Art. 47, Sch.
I of Act IX
of 1908.

The special rule of limitation of three years is also applicable to suits by persons who are bound by an order respecting the possession of any alluvial land made under the Code of Criminal Procedure, Chapter XII. Cases of that description will be governed by Article 47, Schedule II of Act XV of 1877, corresponding to

(1) 5 Cal. L. R. 452 (454).

(2) 12 Cal. W. N. 910.

Article 47, Schedule I of No. IX of 1908. The word "property" in that article of the Limitation Act of 1877 left it vague whether immovable property was intended to be meant by it (1), but that difficulty has been removed under the present Limitation Act by the insertion of the word "immovable" before "property" in Art. 47 of the first Schedule. It is, now, quite clear that if a Magistrate, acting under the provision of Section 145 of the Code of Criminal Procedure (Act v of 1898), gives possession of any alluvial land to any person, his adversary who was a party to proceedings under Sec. 145 will have to institute a suit for declaration of his title within three years from the *date of the final order* under that Code. This view was laid down by a Full Bench of the Calcutta High Court, in the case of *Jogendra Kishore Ray v. Brojendra Kishore Ray* (2). The date of the final order does not run from the date when the rule issued by the High Court under section 15 of the Charter Act is finally disposed of : *Jagannath Marwari v. Ondal Coal Co* (3).

As to the rule of limitation which is applicable to suits for declaration of title to alluvial land which may be attached by a Magistrate, under section 146, of the Code of Criminal Procedure there seems to be a conflict of opinion, so it becomes necessary to examine the position at length.

Rule of limitation applicable when chur land is attached by a Magistrate under sec. 146, Cr. P. C.

In the case of *Akulandammal v. Periasami Pillai* (4), it was held by the Madras High Court that the limitation of three years prescribed by 46th clause of Schedule II, Act IX of 1871 was *inapplicable* to a suit for recovery of property attached by a Magistrate in the course of the proceedings under the provision of the Code of Criminal Procedure when he was unable to determine who was in actual possession of the lands in dispute.

(1) See *Kangali Charan v. Zomurudennissa*, 1 L. R. 6 Cal. 709.

(2) 1 L. R. 23 Cal. 731

(3) 12 Cal. W. N. 840.

(4) 1 L. R. 1 Mad. 309

In *Rajah of Venkatagiri v. Isakapalli Subbiah* (1), certain lands were attached by a Magistrate in 1886, under section 146 of the Code of Criminal Procedure, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands and realised some income from them. Both claimants instituted in 1897, suits in which each claimed the lands as his own and sought to obtain a declaration of title to them as well as to the accumulated income with a view to obtaining possession of the lands and money, from the Magistrate. Under these circumstances, on the question of limitation it was held by the Madras High Court that, in so far as the suits were for declaration of title to immovable property and profits therefrom they were governed by article 120 of Schedule II of the Limitation Act XV of 1877).

As to the applicability of Art. 142, the learned Judges were of opinion that that article was not applicable. The actual or physical possession was with the Magistrate who was not and could not be made a party to the suits. The Magistrate could not be regarded as having dispossessed either party, nor could either party be regarded as having discontinued possession within the meaning of article 142. The attachment by the Magistrate operated in law for purposes of limitation, simply as a detention or custody pending the decision by a Civil Court, on behalf of the party entitled. For purposes of limitation the seizure or legal possession was during the attachment in the true owner.

With regard to article 144, the learned Judges observed that it was still less applicable, as each plaintiff claimed as the true owner and as being in legal possession (by the possession of the Magistrate). The legal possession for purposes of limitation was constructively in the person, who had the title at the date of the

attachment, and such title could not be extinguished by the operation of section 28, however long the attachment might continue.

As for the cause of action, the learned Judges held that the right to sue accrued on the date of attachment. The cause of action for the declaratory suit was the alleged wrongful denial by the defendant in each case of the plaintiff's title and possession, and the procuring by such denial the attachment by the Magistrate.

Referring to the contention of a continuing wrong within the meaning of section 23 of the Limitation Act, it was ruled that there was no such wrong so as to give a fresh starting point for limitation at every moment of the time during which the attachment continued.

As to the subsisting right of the true owner to the lands under attachment, the learned Judges were of opinion that though the suits were barred in so far as they were for a declaration of right to the lands, that bar affected only the remedy or relief by way of declaration and did not extinguish the right and title of the true owner to the property. The operation of section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for possession of property. The right of the true owner to the lands can not be extinguished, however long such an attachment may continue, nor can lands attached under section 146 of the Code of Criminal Procedure be ever forfeited to Government.

It may be observed that the above view with regard to the subsisting right of the true owner to the property attached under section 146 of the Code of Criminal Procedure has not been pushed to its logical extent by the Madras High Court, but restricted to the recovery of the profits derived from such property.

The decision, cited above, did not follow the view expressed by the Allahabad High Court, in the case of

Goswami Ranchar Lalji v. Sri Girdhariji (1). In that case, it was held by the Allahabad High Court that article 47 of Schedule II of the Limitation Act (XV of 1877) did not apply to a suit brought by one of the two claimants against the other to recover possession of property which had been attached by a Magistrate under the provisions of section 146 of the Code of Criminal Procedure and that the article applicable was either 142 or 144.

Next, referring to the decisions of the Calcutta High Court, it may be said that they do not appear to be uniform. In the case of *Deo Narain Chaudhury v. Webb* (2), the land in dispute was attached by a Magistrate under section 146, Criminal Procedure Code, the question of limitation was raised but the special rule of limitation prescribed by the Bengal Tenancy Act VIII of 1885 having been held to be applicable to that case, it was not considered necessary to decide whether article 47 of the Limitation Act XV of 1877 would be applicable to such a case. Apparently the applicability of that article to a suit for setting aside an order under section 146, Criminal Procedure Code, was doubted in that case.

In *Nisaralli Sheikh v. Adebuddi Shan* (3), the property in dispute was attached under Section 146, Criminal Procedure Code, on the 7th March 1899, and remained under attachment and in charge of the Magistrate till the 26th February 1903. Then the purchaser of the holding of the defendant No. 1 who was the opponent of the plaintiff in the proceedings under section 145, applied to the Magistrate to be put in possession of the property as he had been put in symbolical possession of it by the Civil Court. The purchaser was accordingly put in

(1) I. L. R. 20 All. 120.

(2) I. L. R. 28 Cal. 86; 5 Cal. W. N. 160.

(3) 16 Cal. W. N. 107.

possession, and the suit was instituted by the plaintiff on the 28th February 1906. On the question of limitation raised in the case, it was held that the limitation applicable would be that provided by article 142 or article 144 and not by article 120 of Schedule II of the Limitation Act XV of 1877. In this view, the Allahabad decision in the case of *Goswami Ranchar Lalji*, cited above, (1) was followed, and the Madras decision in the case of *Raja of Venkatagiri v. Isakapalli Subbiah* (2), was dissented from.

In the case of *Brajendra Kishore Rai v. Abdul Razac* (3), the land in dispute was attached by the Magistrate under section 146 of the Criminal Procedure Code on the 25th April 1902. Two suits were instituted by two sets of plaintiffs for declaration of their title and recovery of possession, one on the 3rd July and the other on the 11th October 1909. The Court of first instance decreed the suits of the plaintiffs holding that they had established their title to the lands in dispute and that they were in possession of them at the time of the attachment by the Magistrate, and that, in that view, they have been in possession within twelve years, their suits were not barred by limitation. But, on appeal, the District Judge on the authority of the Madras decision in the case of *Raja of Venkatagiri v. Isakapalli* (2), held that the suits were barred by six years rule of limitation under Article 120 of Schedule I of the Limitation Act. On second appeal to the High Court, the decisions of the District Judge were reversed and it was held that suits for declaration of title under section 42 of the Specific Relief Act I of 1877 and were governed by section 23 read with Article 120 and not by Article 142 of Schedule I of the Limitation Act No. IX of 1908.

(1) I. L. R. 20 All. 120

(2) I. L. R. 26 Mad. 410.

(3) 22 Cal. L. J. 283

ALLUVION AND DILUVION.

RELATING TO THE LAW OF EVIDENCE

The special features of the law of evidence in connection with the suits respecting alluvial lands will have to be discussed under this head. It is not within the scope of this book to discuss the Law of Evidence generally and the attention will therefore be confined to those provisions of the Evidence Act, which are specially applicable to the suits to be governed by the Regulation. The frequent changes which are produced on the sea coast of Bengal by the processes of alluvion and diluvion have been discussed before (see pp. 1 & 18, *ante*). The prominent characteristics of the river of the country by which large portions of land are constantly carried away from one side of its banks and joined to the opposite side has been noticed before (see p. 327 *ante*). In fact the frequent changes which are the normal conditions of the rivers of this country render it often times difficult to determine the limits of any particular estate as it existed at the time of the Permanent Settlement. The capricious and variable courses of the rivers sometimes efface the old boundary marks by submerging the banks, where the processes of alluvion and diluvion occur incessantly. Under this state of things, litigants always look back to the earliest possible survey map of this country, which may be of some help in determining the boundary of a riparian estate as it existed at the time of the Permanent Settlement. This accounts for frequent references to the Maps prepared by Major James Rennell in cases which are governed by the law declared by the Regulation.

Rennell's
Maps.

A short account of Rennell's work.—It would appear that Major Rennell's work began in this country on the 12th August, 1765. From 1767 to 1777 he was

employed on Land Surveys in Old Bengal (New Bengal, Bihar, Orissa, and a portion of Assam) and his earlier work was entirely connected with River Surveys. His first essay was to find the shortest all the year round route of river communication for carrying 300 maunds, between Calcutta and the main Ganges river. The orders for this work are contained in the letter to Major Rennell dated 7th May 1764, from Hon'ble Henry Van Sittart, Esq., Governor of Fort William. (See the Surveys of Bengal by Major James Rennell, F.R.S., 1764-1777 edited by Major F. C. Hirst, Director of Surveys of Bengal, published in 1917, pp. i & ii) It seems from the short sketch of his life given in the book of Major Hirst that the order was given to Rennell as he was appointed Surveyor-General of the East Indian Company's dominions in Bengal (1) Rennell's work in this country may be classified into two divisions, namely, (1) River Surveys and (2) Land Surveys.

In connection with his River Surveys, he produced during the period 1764-1766 the following main series of river maps.—(2)

(i) *Ganges series*—Jellinghi to the Meghna River. Five hundred yards to 1 inch.

(ii) *Ganges series*—Lukhipur to Dacca. Two inches to 1 mile,

(iii) *Brahmaputra series*—From near Dacca to just above Goalpara in Assam. Two miles to 1 inch.

(iv) *The Creek series*—Embracing surveys of possible perennial navigable creeks in the triangle formed by the line Jellinghi-Hughly on the west; the Seaface on the south, and the Ganges and lower Meghna on the east. In this case the scales adopted were different in different parts.

As to his Land Surveys this much should be noticed

(1) Surveys of Bengal by Rennell, edited by Major Hirst, p 49.

(2) *Ibid.* p. 11.

that he was an ardent supporter of route surveys and considered them sufficient for all ordinary purposes. So far as evidence is available, Rennell surveyed the main routes through a tract under survey, and put in minor routes and the positions of villages, etc., at a distance from his main routes from the oral evidence of the local people. His work of mapping the whole of Bengal commenced in 1767 and he completed it before he left India finally in 1777. His maps of the different parts of Bengal were generally drawn on the scale of 5 miles to 1 inch, (1)

Practical
value of
Rennell's
Maps.

In accordance with the view expressed by Major Hirst, the practical value of Rennell's maps lies in the following directions (2).

(a) *For Revenue purposes*—The survey of Major Rennell was first used for revenue purposes on an extensive scale during the *diara* survey of Babu Parbati Charan Ray. Under the instruction of the Board of Revenue, large releases of land from resumption under Act IX of 1847 were made by the Commissioner of the Dacca Division on the basis of Rennell's maps. The decision of the Board of Revenue, at that time, was that whatever was surveyed by Rennell as land should be admitted to have been included within the Permanent Settlement. It does not appear that there was any contest in the Courts of law with reference to the value of Rennell's maps for revenue purposes about that time. The decisions relating to the relevancy of Rennell's Maps were apparently passed subsequently.

(b) *For the study of river changes in Bengal.*

(c) *For the study of Physical Geography and Geology.*—The 5-mile maps afford helps in both of these subjects.

(d) *Engineering and Sanitation.*—Recent changes in

Surveys of Bengal by Rennell, edited by Major Hirst, pp. 21-32.

(2) *Ibid.* p. 5.

level, and their effect upon limits of inundation, etc. may be examined roughly, with Rennell's 5-mile maps as starting points.

(e) *History*.—The maps have a historical value which will probably increase as time passes.

The main importance of Rennell's work in India lies in the fact that his survey, now about 150 years old, was the first that was made of the large area. And though judged by modern standard of accuracy, work is open to some criticism, yet as a starting point for investigation in several important directions, his results are invaluable.

Legal value of Rennell's maps.—

From the short account which has been given above regarding the survey maps prepared by Major Rennell it would be apparent that they were meant to ascertain the waterways and land routes passing through this country as they existed between the period of 1764-1773 and not meant to serve revenue purposes. There is also a further serious difficulty involved which one feels while attempting at relaying the map prepared by Rennell. The starting point in all cases will be merely a guess work, a slight mistake in which will lead to a great difference in the result. It would seem that these were the circumstances which induced the Calcutta High Court to hold that Rennell's maps could not be treated as a safe guide for determining the boundaries of estates as they existed at the time of the Permanent Settlement. This would be evident from the decisions referred to below :—

In the case of *Kali Kissen Tagore v. The Secretary of State* (1), where reliance was placed by the plaintiff upon Rennell's map as one of the materials to establish that the land in dispute was a reformation upon the

(1) A. O. D. 105 of 1896 decided by Ameer Ali and Pratt, JJ., decided on 21st August 1898.

site of his permanently settled estate, it was held affirming the judgment of the Court below that that document did not prove the contention of the plaintiff, namely, that the lands in dispute were included within his estate at the time of the Permanent Settlement, and that there was nothing to indicate that the position of the river remained unchanged between 1773 and the time of the Permanent Settlement.

*Rani
Hemanta
Kumari
v.
Secretary of
State.*

In the case of *Rani Hemanta Kumari Debi v. The Secretary of State* (1), while reversing the decision of the Calcutta High Court, in *Watson v. Sree Sundari Debi* (2), their Lordships of the Privy Council, regarding the maps of Major Rennell made the following observations in one part of their judgment:—"The earliest documentary evidence is an extract from Rennell's survey map dated the 7th July 1780, and therefore nearly contemporary with the Decennial Settlement on which the Permanent Settlement was based. This map shows that the disputed land was then dry land, and that there was many villages to the north of what was then the river-bed. But beyond this general remark it does not appear to their Lordships to afford any safe inference either for or against the first appellant." In another part of the same judgment, their Lordships said:—"It appears to their Lordships to be a fair inference from the document of the 12th August 1837 that no material alteration took place in the position of the northern boundary of the river as shown in Rennell's map until the year 1795, or six years of the date of the Permanent Settlement, and that at that date there was a zemindari estate called Bhobanund Diar situate on the then northern bank of the river which was its southern

(1) 3 Cal. L. J. 560.

(2) A. O. D. No. 52 (and other Analogous appeals) of 1899 decided by Maclean, C. J.

boundary and having for for its northern boundary the pergunnah Luskarpur which was conterminous with it." This was a most material finding arrived at by their Lordships to support the ultimate conclusion that lands in dispute were reformations *in situ* of lands which were comprised in pergunnah Luskarpur.

In the case of *The Administrator-General of Bengal v. The Secretary of State* (1), the above decision in the case of *Kali Kissen Tagore v The Secretary of State* (2), was followed. In a part of the judgment, Brett and Woodroffe JJ., referring to the map by Major Rennell observed.—"The map was prepared from 25 to 30 years before the date of the Permanent Settlement. At the time it was prepared no question of the settlement of Revenue appears to have been raised, and there is nothing in the map itself or in the authority to which we have referred to indicate that the map was prepared with the intention of representing in it local divisions for the purpose of assessing the Government Revenue."

In *Sarat Chandra Singh v. Kshitish Chandra Roy* (3), Moookerjee, J. after referring to the conditions under which the map by Major Rennell was prepared as also to the difficulties of relaying it, said thus:—"Under these circumstances we are unable to uphold the contention of the appellant that the map of Major Rennell ought to be accepted as the basis for the determination of boundaries of the estate of the plaintiff. If we were to do so, we would have to use the map for a purpose for which it was never intended to be used; it would not be right to accept as a basis for the determination of the boundaries of permanently settled estates, a survey which had been made 25 years before for the purpose of showing mainly the courses of rivers and

*Sarat
Chandra
Singh v.
Kshitish
Chandra Roy.*

(1) A.O.D. 335 of 1901 decided on 9th July 1904 by Brett & Woodroffe, JJ.

(2) See p. 661 *ante*.

(3) 12 Cal. L. J. 216 (219).

land routes throughout the country." The learned Judge, then, supported his view by the referring to the cases, cited above, and next, said as follows — 'The commissioner as well as the learned Subordinate Judge have done the best they could with the map of Major Rennell, which has been rightly used to determine the course of the river Bhagirathi before the time of the Permanent Settlement.' It would, therefore, seem that, as laid down in the second quotation, the map of Major Rennell can only be used for the purpose of determining the course of a river.

*Haradas
Acharjya v.
Secretary of
State.*

The same view was re-iterated by Mookerjee, J in the case of *The Secretary of State v. Kalika Prosad Mukerjee* (1). But the decision in that case was reversed by the Privy Council on appeal to that Board, in the case of *Haradas Acharjya v. The Secretary of State* (2). In that case, the plaintiffs claimed a large tract of land which was formerly, under the river Ganges as being part of their permanently settled zamindari and relied upon three sets of documents, namely, *first*, a plan of the survey conducted by Major Rennell between the years 1764 and 1773, *secondly*, the Hakikat Chowhuddibundi (boundary papers, which were returns required for 1799, and made by the owners of the zemindari and sent in to the Government, and *thirdly*, the Government survey map made in 1859. The primary Court of the Subordinate Judge allowed the claim of the plaintiff, but in appeal to the High Court of Calcutta, the suit was dismissed; but ultimately on appeal to the Privy Council, the decree of the Subordinate Judges was restored by the Judicial Committee with some modifications.

In regard to the map of Major Rennell it appears that the Subordinate Judge founded his conclusion mainly upon this map which was published in 1780 and also upon *Hakikat Chowhuddibundi* papers. The

(1) 15 Cal. L. J. 281.

(2) 26 Cal. L. J. 590.

for the effect of these returns is to establish that taking the two *semindaries* together there was a large estate through which the river ran from east to west, although the exact position of the river may not have been and can not now be, confidently located."

... ..
 "The question as to the river is more difficult. Pushed to its extreme it would result in this: that whenever a *semindari* had been the subject of permanent settlement and there was any dispute as to its external boundaries, the *semindars* would never be able to establish title to any portion of it if it happened to be traversed by a navigable river of variable course, unless they could show what were the exact boundaries of that course at the date of the Permanent Settlement. Such a conclusion their Lordships wholly reject. The object of the Permanent Settlement was to confirm the *semindars* in their holdings at a fixed and immovable rent, and, if assumptions are made, one way or the other, they ought to proceed upon an attempt to justify the title rather than to render it insecure."

... ..
 "Rennell's map is undoubtedly, both owing to its difference in scale, to the different purpose of its preparation, and to the difficulty of assigning fixed points from which the survey was made, a map which it is hard to incorporate into the survey of 1859. And, again, the variability of the river renders reliance upon it difficult. As has already been said, their Lordships are not, however, prepared to dispossess the appellants because of this difficulty. It may be that any assumption that can now be made cannot be exact, but some assumption is necessary. They think upon the whole that the right course to follow is that taken by the surveyor of experience to whom this matter was referred by the Subordinate Judge, namely, to adopt the position of

the river as shown on Rennell's map, and to adapt this map as far as possible to the conditions now known to exist."

It appears from the concluding part of the judgment that their Lordships directed that the decree of the Subordinate Judge would be varied according to "Rennell's map" as plotted on the case map by the Commissioner.

Now, from the passages, quoted above, it is evident that their Lordships were fully mindful of the difficulties, that induced the Calcutta High Court in the above cited case to reject the map by Major Rennell as proof of the boundaries of the estates, as they existed at the time of the Permanent Settlement. But, yet their Lordships relied greatly upon the map of Major Rennell. The reason apparently seems, as the second and third passages quoted above would indicate, that there is a difference between a case where a "total estate" claimed has one of its limit upon a river depicted on Rennell's map, and a case, where such a river flows through such an "whole estate." In the former case, there will evidently be some difficulties if reliance is to be placed upon Rennell's map, but in the latter case, there would be no such difficulty, even if the exact position of the river can not be confidently located. Because, as pointed out by their Lordships in that case, this was not a matter that was material, if there were no gaps between the boundaries of different *mouzas* constituting the "whole estate." Their Lordships held that the High Court was wrong in asking that such boundaries should be given and they had erred in seeking exact information, which, however desirable, was not essential to the determination of that case. The criticism of the High Court relating to the failure of the plaintiff to give the exact boundaries between the different *mouzas* "would have been formidable, were

The view of
the Privy
Council
discussed.

the dispute one as between the owners of adjacent *mouzahs*, in which case the definition of the boundaries would be essential, but they lose their weight when once it is established that, however the boundaries run *inter se*, the *mouzahs* together cover the area in dispute."

It is true that there was no dispute between the different *mouzahs* constituting the two blocks on the north and south of the river Padma, but as between the two blocks, there was evidently a dispute with regard to the ownership of the bed of the river which Government claimed as its property, and in that view there was a dispute between the adjacent owners, the plaintiffs and the Government. It was, therefore, necessary that the riverain boundaries of the blocks on each side of the river should be determined, and for that purpose their Lordships apparently relied upon the map by Major Rennell for reasons stated in the last two passages from the judgment, quoted above. In these two passages, their Lordships laid down that assumption *should be made to justify the title of the zamindars to the property permanently settled with them and not to make it insecure*. The considerations which seem to have induced their Lordships to accept Rennell's map as evidence of the boundaries in that case were apparently the following; namely, (1) that the map was prepared with the authority of the Government, (2) that it was in the custody of the Government as a document of great importance, and (3) that it received corroboration from the *Hakikat chowhuddibundi* papers and the Government survey of 1859.

The rule that is deducible from the decisions, cited above, relating to the legal value of Rennell's Map may be stated thus: that Rennell's map is to be treated as a good evidence of the inclusion of lands within the boundaries of permanently settled estates in the presence

Rule
deducible
from the
conflicting
decisions.

of other evidence in support of it, and in the absence of any such corroborative evidence, the view expressed by the Calcutta High Court would apply.

ALLUVION AND DILUVION.

THAKBUST AND REVENUE SURVEY

The main
object of
Revenue
Survey.

By Regulation I of 1793, the terms of the Decennial Settlement of 1789-1790 concluded with *zemindars*, independent *talukdars*, and other actual proprietors of land paying revenue to Government in the Provinces of Bengal, Behar and Orissa were made permanent. In the result, a great part of Bengal, and some areas in Assam together with portions of Orissa were declared not liable to any further increase of revenue and the *zemindars*, independent *talukdars*, and other actual proprietors of land were vested with the right to transfer by sale, gift or otherwise their proprietary rights in the whole or any portion of their respective estates without any sanction of Government. The limits and areas of estates which were thus perpetually settled were matters of great importance to the Collectors of Revenue. It appears that the information collected previous to 1799 regarding these points was incomplete and most probably inaccurate. Collectors of Districts affected by the Permanent Settlement found themselves in difficulties as to what land had actually been included in the Permanent Settlement. The people were not slow to push forward cultivation into jungle tracts, and as the cultivation extended rents were collected by *zemindars* for land which, sometimes were not actually covered by the Permanent Settlement. The situation was complicated by the rapid dis-integration of the original estates, which being alienated in parts led to disproportionate allotment of assessment. Estates sold for arrears of revenue or for other causes were bought by Government or by private persons and very often the estates could not be located upon the ground. These and

other causes rendered it difficult to administer efficiently the permanently settled areas. The help of the Revenue Surveyor was therefore called in to settle once and for all, the limits of the estates, and to make such map of them, and collect such informations about them, as would render disputes impossible in future. The chief object of the Revenue Survey in this country was apparently the definement of every estate on the Collector's Rent Roll, and to determine the relation of land to revenue by the ascertainment of the areas and boundaries of estates or *mehals* permanently settled, (1).

In order to save time and money, the scientific Revenue Survey in this country was preceded by a preliminary survey known as *Thakbust* survey which means a demarcation survey, the chief object of which was to demarcate finally on the ground the boundaries of all villages and estates in the area for survey. *Tak-Hindi* (derived from Persian *Tak*) means a pillar set up as a boundary mark. *Takbast*—corruptly *Thakbust* (Persian *Busth* a binding), laying down a boundary.

The object of
Thakbust
Survey.

The divisions of land in this country into *Pergannahs*, *villages* and *mehals* have been in existence from time immemorial. The collection of land-revenue of India during the Mahomedan rule was apparently connected with these divisions (2) It would not be out of place to mention in this connection that a similar system for collecting revenue also prevailed in this country under the Hindu Kings. In permanently settled areas it was found convenient to adopt the village recognized locally as the real unit of the *Thak-*

(1) Thuillier's Manual of Surveying for India, p. 361, and Notes on the Old Revenue Surveys of Bengal, Bihar, Orissa and Assam by Captain F. C. Hirst, pp. 1 & 2.

(2) Hunter's Statistical Account of Bengal, Vol. I, p. 264.

bust survey which was very often *mousawar*. In some cases the *Thak* survey was *pergunnawar*, that is to say, adopted the *pergunna* as its *unit*. A Settlement Officer about a year before the Revenue Survey with his staff proceeded to demarcate the boundaries of the villages. His chief object was to keep in advance of the Revenue Survey, so that there may not be any hindrance to that work. He had to furnish a sketch map of the boundary of every village demarcated, exhibiting the points at which mud pillars (or *thaks*) were erected at certain measured distances generally about 200 to 300 feet apart, together with a file, or *misl* explaining the position of those marks and the names of the adjoining villages. At every principal angle or head of the boundary a mud pillar (or *dhue*) was erected, which were about five feet at all village tri-junction (triple junction for villages). An acknowledgment (*suppooradnamah*) from the several parties concerned as to the accuracy of the boundary laid down, was made out by the Amin and signed by the parties. A memorandum (*roodud*) containing the following items was made out by the Amin :—(1) names, the nature, and any peculiarities of the village dealt with, (2) details of the odd pieces of land which belongs to the village, but which fell outside its boundary as fixed by the *Thak* Survey, or of the interlaced lands belonging to other villages; (3) other details of a statistical nature.

As soon as all these were completed they were forwarded for use and guidance of the Surveyor, without which it would have been difficult for him to proceed. So great importance was placed on the due performance of the duty that surveyors were positively interdicted from surveying any boundary, unless they were in actual possession of these demarcation papers, (1).

Thak Mujmili :—This was simply a roughly congre-

(1) Thuillier's Manual of Surveying for India, p. 363.

gated sketch of Thakbust villages, each village plan being to a suitable scale. Its object was to give the Revenue Surveyor a proper idea of the relative position of the different villages in a Pergana.

The scales used for Thak Maps varied from 4" to 24" to one mile, but the most common scale was 16 inches to 1 mile.

Legal value of Thak Maps :—The Thak Maps were apparently prepared under the authority of Government and not under any enactment of the Legislature. They are evidently admissible in evidence under sections 36 and 83 of the Indian Evidence Act (No. 1 of 1872). From what has been said above regarding the preparation of the Thak Maps, it would be clear that Thak Survey proceeded according to the possession and it can therefore be taken as presumptive evidence of possession at the time when it was made. Some cases have gone further and treated it as evidence of title although not conclusive (see pp. 381-386 *ante*).

In the case of *Pagnse v. Mokoond Chunder Sarma* (1), it was contended in special appeal, that the evidence that the land claimed by the plaintiff was *thaked* as appertaining to his Taluk was not enough and the plaintiff ought to have been put to the proof of his title and that the *thakbust* proceedings were no evidence of title. In overruling this contention, Kemp, J., said :—
“Now, it has been held in several cases which are quoted by the Judge that, where thakbust proceedings, conducted in the presence of both parties, declare the land in dispute to be included in the zemindaree of A and B seeks to include them in his own zemindarie, B must prove by counter-evidence at what precise time, if ever, he, or any one under whom he claims, was in possession. Thakbust maps have been held to be evidence of possession, although not conclusive as to title, and if they

Thak maps are good evidence to prove the boundaries and the lands included in estates.

are evidence of possession, they are also some evidence of title."

In Mohesh Chunder Sen v. Juggut Chunder Sen (1), the plaintiff brought the suit for recovery of certain lands on the ground that they formed part of a permanently settled taluk purchased by him. The only evidence adduced by the plaintiff was a thakbust map which had been signed as correct by the predecessors-in-title of both the plaintiff and defendant and in which the lands in dispute were laid down as the lands of the plaintiff's predecessors. It was held that the evidence was not sufficient to justify a decree for the plaintiff.

In the case of *Joytara Dassie v. Mohomed Mobarruck* (2), Field, J., in delivering the judgment on the value of the thak map, said as follows — "Now, thak maps are, as has been pointed out in many decisions of this Court, good evidence of possession, but the value of that evidence varies enormously. In the case of a thak map containing definite landmarks and undisputed boundaries signed by the parties or their accredited agents, and representing land which has been brought under cultivation, and is in the possession of ryots whose names are known or can be discovered from the zemindari papers, a thak map is a very valuable evidence of possession. But the value of such a map is greatly diminished when we find that there are no natural landmarks delineated thereupon, that the land was jungle when measured; that the boundaries are not discoverable from a mere inspection of the map; and that neither the zemindars nor their agents have, by their signatures, admitted the correctness of the thak."

In the case of *Syama Sunderi Dassya v. Jogobundhu Sootar* (3), the sole question for determination was a

(1) I. L. R. 5 Cal. 212.

(2) I. L. R. 8 Cal. 975 (1983); 11 Cal. L. R. 699.

(3) I. L. R. 16 Cal. 186.

question of the boundary of two taluqs. The Lower Appellate Court refused to give effect to a certain thak map which was prepared in 1859 and upon the face of which appeared what were admitted by the parties then owning the taluqs to be the boundary lines of the taluqs at the time. No evidence was given showing that these boundary lines had ever been changed. Upon these facts, it was held that the map was clearly evidence of what the boundaries of the properties were at the time of the Permanent Settlement and also as to what they admittedly were in 1859.

In *Satcowri Ghose v. The Secretary of State* (1), it was held that the thak map regarding a jalkar as appertaining to a particular estate was a presumptive evidence as to the fact that such julkur was part and parcel of the estate at the time of the Permanent Settlement. Following the above decision it was further held that the thak map as evidence of possession was also evidence of the title. See also *Jagadindra Nath Roy v. The Secretary of State for India* (2)

In *Abdul Hamid v. Kiran Chandra Roy* (3), it has been held by the Calcutta High Court (*per* Maclean, C.J. and Geidt, J.) that the object of the thak map being to delineate the various estates borne on the Revenue Roll of the District, the entry in a thak map that certain lands formed part of a certain estate becomes a relevant fact under Sec. 36 of the Evidence Act, and such entries in thak maps are evidence on which a Court may act. It is open to the Court to hold that the same state of things existed at the time of the Permanent Settlement. See also *Kumar Saradindu Roy v. Bhagbati Debbya* (4), and *Bidlumukhi Dasi v. Jitendra Nath Roy* (5), and *Dunne v. Dharani Kanta Lahiri* (6)

(1) I. L. R. 22 Cal. 252.

(3) 7 Cal. W. N. 849.

(5) 10 Cal. L. J. 527.

(2) I. L. R. 30 Cal. 291. 7 Cal. W. N. 193.

(4) 10 Cal. W. N. 835.

(6) I. L. R. 35 Cal. 621

In the case of *Preonath Mazumdar v. Durga Tarini Ghose* (1), it has been held that the evidentiary value of a thak map may be affected by the condition of the land at the time the survey was made but the thak map can not be ignored upon a general allegation that the land at the time was jungle.

In *Maisuddi Biswas v. Ishan Chandra Das* (2), it has been held that the thak map is a valuable evidence of possession and as evidence of possession, it is also valuable evidence of title, and that merely because certain specified lands were included in an estate at the time of the thak survey in 1859, it can not be affirmed as a proposition of law that they must have been included within that estate at the time of the Permanent Settlement, but it is open to the Court to draw such inference from all the surrounding circumstances.

In the case of *Fazlur Rahim v. Narentra Krishna Ray* (3), after referring to all the above decisions it has been held that it can not be laid down broadly that a thakbust map prepared in 1865 is no evidence of the state of things at the Permanent Settlement and that, where in deciding whether certain lands in dispute were included within one state or another at the time of the Permanent Settlement, the Lower Appellate Court relied on the thakbust map, the finding thus arrived at can not be questioned in second appeal. See also *Amrita Sunilavi Debi v. Serajuddin Ahmed* (4).

Thakbust maps are not evidence of subordinate tenures.

As to the internal condition of a revenue-paying estate, namely, relating to the subordinate tenures within it, it has been held that the thak map was not intended to represent and was, in no sense, a record of tenure subordinate to Government revenue paying estates and that 'it was of no value as evidence in a suit in which the

(1) 14 C. L. J. 578: *Priyanath v. Mahendra Kumar*, 16 C. W. N. 317.

(2) 13 Cal. L. J. 293.

(3) 17 Cal. W. N. 151.

(4) 19 Cal. W. N. 565.

extent of the interest of Shikmee Talukdar was the matter for consideration *Mohima Chander Roy v. Wise* (1).

Regarding the statements recorded in *Thakbust* maps, reference may be made to the case of *Jarao Kumari v. Lalommoni* (2), decided by the Privy Council.

Thak and Revenue Survey Maps.

The actual object which induced the Government to survey the whole of India in connection with the assessment of revenue have been shortly discussed before (see p. 671 *ante*). Looking at the point from its legal aspect, it becomes now necessary only to state the connection between the Thak and Revenue Maps. It had been stated before that the Revenue Surveyor had in his hand *Thakbust* papers and that there was a very stringent rule that no Revenue Surveyor was to take up work upon any boundary until it had been adjusted by the *Thakbust* office (3). It may therefore seem reasonable to expect that there would be no difference between the boundaries of the *Thakbust* survey and those picked up and surveyed by the Revenue Surveyor. In fact, it was the duty of the survey officer to compare the map of every village after it was surveyed with the Thak Map and Thak papers, and if he was satisfied that the two boundaries represented the same boundary on the ground, he initialled the Thak map in token of the correctness of the Thak Map. In case of discrepancies, immediate report was to be made for inquiry (4). But, in many cases, the boundaries of estates which fell inside villages, were not shown on the Revenue Survey Maps; the reason for this appears to be that the small estate boundaries could not be shown on the scale of 4 inches to

Relating to
the legal value
of Thak and
Survey maps.

(1) 25 Suth. W. R. 277.

(2) I. L. R. 18 Cal. 224

(3) Thuillier's Manual of Surveying for India, p. 363 (3rd Edition).

(4) Ibid. pp. 253 & 307-308.

1 mile adopted for the Revenue Surveys, (1). In such cases, it is necessary to fall back upon the Thak Map and *khasra* maps where khasia operation took place. There are also possibilities of discrepancies between the Thak and Revenue Maps, when the old *Thak* marks from the lapse of time and other causes were removed or destroyed and not found on the ground (2). Speaking generally, it may be affirmed that the *pergunawar* (pergana by peiguna) Revenue Survey Maps were drawn to a scale of 1 inch to a mile and Mouzawar Maps, to a scale of 4-inch to a mile (3). As to the relative legal value of the Thak Maps and Revenue Maps, it can not be affirmed as an invariably correct proposition that the Revenue Maps are always to be preferred to Thak Maps.

In the case of *Moumohini Debi v. Wason & Co* (4), Privy Council upheld the view expressed by the Subordinate Judge to the effect that in cases of disagreement between the Thak and Revenue Maps, the Survey Map should be adopted, specially in a case where it corresponds with that locality and laid it down that it was not needed that the Thak Map should be shown to accurately represent the former plots.

In *Abid Hossein Mandul v. Dowcurry Pal* (5), the Calcutta High Court may be taken to have upheld the view that as a general rule the thak and survey maps should agree and where they differ, the one that more clearly agrees with the local land-marks is the one which should be followed, and that there is no general or definite rule making it incumbent upon the Court to follow either the one or the other and the Court may, if it considers the Thak map more reliable, follow that in preference to the Survey Map.

(1) Notes on the Old Revenue Surveys of Bengal, Behar, Orissa and Assam by Hirst. p. 21. (2) *Ibid*, p. 377. (3) *Ibid*. p. 291.

(4) 1. L. R. 27 Cal. 336 : 4 Cal. W. N. 113.

(5) 6 Cal. W. N. 629.

In the case of *Dunne v. Dharani Kanta Lahiri* (1), the dispute was, whether certain land belonged to the estate of the plaintiff or to that of the defendant. The plaintiff produced the *thakbust* as also survey maps of the years 1852-53 and the Thak map contained a statement which supported the plaintiff's case. The predecessors of the defendant had full notice of the thak proceedings and he objected to the boundary line between his and plaintiff's. The defendant produced a survey map of 1855-56 of the district, which contained his estate, in support of his case, but he did not produce any *thakbust* map of the same years, and there was no evidence to support the accuracy of his survey map. Upon these facts, it was held that the evidentiary value of the *Thakbust* map and survey map produced on behalf of the plaintiff was greater than that of the survey map produced on behalf of the defendant.

In the case of *Nawab Bahadur of Murshidabad v. Gopi Nath Mandal* (2), it has been laid down that thak and survey maps afford important evidence of possession at the time they were made, and as evidence of possession, they afford also valuable evidence of title, and that in case of disagreement between the thak and survey maps, the one that more closely agrees with the local land-marks is to be followed.

In *Amrita Sundari Debi v. Serajuddin Ahmed* (3), it has been observed that no hard and fast rule can be laid down that a survey map is more reliable than a thak map. The true principle is that the map which more clearly agrees with the local land-marks is the one that should be followed.

A survey map may be resorted to for assistance in considering the evidence of a thak map as to area and boundary : *James Burns v. Achumbit Roy* (4).

(1) 1. L. R. 35 Cal. 621.

(2) 12 Cal. W. N. 273; 13 Cal. L. J. 625.

(3) 19 Cal. W. N. 565.

(4) 20 South W. R. 14 (Civ)

As evidence of possession they are evidence of title under the circumstances of a particular case.

Nobo Coomar
v.
Gobind
Chunder.

The relative evidentiary value of Thak and Revenue Survey maps has been discussed in the foregoing pages. Next, it becomes necessary to discuss the legal value of any survey map prepared under the authority of Government. The decision in *Nobo Coomar Das v Gobind Chunder Roy* (1), may be taken as a leading case on the point. In that case, Field, J., considered the most important earlier cases on the subject reported in Sutherland's Weekly Reporters, namely, the cases of *Luleet Nairan v. Narain Singh* (1 W. R. 333), *Mahomed Meher v. Sheeb Parshad* (6 W. R. 267), *Komodinee Debia v. Poorno Chunder* (10 W. R. 300), *Shusce Meekhee v. Bissessuree* (10 W. R. 343), *Kaylash Chunder v. Raj Chunder* (12 W. R. 180), *Oommut Fatima v. Bhujio Gopal* (13 W. R. 50), *Raja Leelanund Sing v. Raja Mahendur Narain* (13 W. R. 7, P. C.), *Ram Narain v. Maheshchunder* (19 W. R. 202), *Narain Singh v. Nurendro Narain* (22 W. R. 296), *Jugdish Chunder v. Chowdhury Zuhoor-ul-Hug* (24 W. R. 317), and *Prosonno Chunder v. Land Mortgage Bank* (25 W. 453), as also the case of *Mahesh Chunder v. Juggut Chunder* (1. L. R. 5 Cal. 212), and enunciated his view in the following words —“ Now the proposition which, it appears to me, is to be deduced from the cases is this : a survey map is not direct evidence of title, in the same way as a decree in a disputed cause is evidence of title for the survey officers have no jurisdiction to inquire into or decide questions of title. Their instructions are to lay down the boundary according to actual possession at the time ; and this is what they do, ascertaining such actual possession as well as they can, and, if possible, by the admissions of all the parties concerned. A survey map is, therefore, good evidence of possession according to the boundary demarcated thereupon, and which may be taken to have been admitted by those concerned to be correct, regard being had to what has been said about

the nature of this admission in each particular case. In several of the cases quoted, this Court has (to my mind, very properly) refused to lay down any general rule as to the weight to be assigned to a survey map as a piece of evidence: and in one case a learned Judge of this Court declined to say whether, in any particular case, maps ought not to be corroborated by independent evidence. A survey map is then direct evidence of possession: and with reference to the particular circumstances of such case, the Courts must decide whether the evidence of possession is sufficient to raise a reasonable presumption of title."

The similar view appears to have laid down in *Syam Lal Sahu v. Lachman Chowdhury* (1), where it has been held that a survey map is evidence of possession at the time at which the survey was made, and may be evidence of title, but as to whether it is sufficient evidence or not is a question to be decided in each particular case.

In *Gajhoo Damor Singh v. Kotwar Jagatpal* (2), it has been held that sec. 36 of the Evidence Act does not require that the authority under which a map is prepared must be an authority given by Statutes, and that such map is admissible in evidence although not prepared for revenue purposes.

In the case of *Maharaja Jagadindra Nath Roy v. Secretary of State for India* (3), it has been laid down by their Lordships of the Judicial Committee of the Privy Council that maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary they may

(1) I. L. R. 15 Cal. 353.

(2) 11 Cal. W. N. 230.

(3) I. L. R. 30 Cal. 291; 7 Cal. W. N. 193.

be properly judicially received in evidence as correct when made. In *The Secretary of State for India v. Maharaja Radhakishore* (1), their Lordships have said that they have always given great weight to the accuracy of the survey maps, which are, however, not conclusive; but in the absence of evidence to the contrary they will be presumed to be conclusive.

See *Mahendra Nath Biswas v. Shamsunnessa Khatun* (2), where all the cases upon the point have been cited by Mookerjee, J., while delivering the judgment of the Court in that case.

So long the legal value of Thak and Revenue Survey Maps has been discussed with reference to the point that they are good evidence of possession at the time they were made as well as of title under particular circumstances. Next, a question arises, whether they are good evidence of the conditions of things which existed at the time of the Permanent Settlement in 1793, in other words, whether they can be received as presumptive evidence of the original limits of permanently settled estates.

Thak and Survey maps are not conclusive evidence of the lands included in a permanently settled estate.

That they can be received as evidence of the boundaries of the estates as they existed at the time of the Permanent Settlement was laid down in the case of *Sarat Sundari Debi v. The Secretary of State* (3). In that case, while interpreting the provisions of Act IX of 1847, Wilson and Beverley, JJ., observed:—"In every case, the starting point is to be the revenue survey, which, it would appear, is to be taken as representing the boundaries of the estate as they existed at the time of the permanent settlement, and it is apparently not open to the revenue authorities to go behind that survey and enquire whether in fact the boundaries at the time of settlement were not other than therein represented."

(1) 25 Cal. L. J. 425.

(2) 21 Cal. L. J. 157.

(3) I. L. R. 11 Cal: 784. (790).

But this view was subsequently overruled by the Full Bench decision in the case of *Fahamidamissa Begum v. The Secretary of State* (1), where it was held that the comparison of the two maps was not conclusive: (see p. 292 *ante*). It would follow from this view that the last survey as contemplated by Sec. 3 of Act IX of 1847 can not be treated as conclusive evidence of what lands were originally included in a permanently settled estate, as pointed out by Lord Lindley in the following portion of the judgment, in the case of *Maharaja Jagadindra v. The Secretary of State* (2):—"Assuming lands not to be within the Permanent Settlement of 1793, then their Lordships agree with the contention of the appellant's Counsel that the last survey made under section 3 of the Act IX of 1847 is to be taken as the starting point for deciding, when the next survey is made, whether lands are within sections 5 and 6 of that Act. But when the question arises whether lands shown on a particular thak or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793 the inquiry is at once enlarged; and it would not be right in point of law to direct the Judge of First Instance that he ought in all cases to act on the last thak or survey map and to treat it as decisive in the absence of evidence to the contrary."

*Maharaja
Jagadindra
v.
Secretary of
State.*

But, in the course of the above decision, the Privy Council approved the decision of the Calcutta High Court in the case of *Satcowri Ghose v. The Secretary of State* (3), where from the entry of a *jalkar* in the Thakbust map of 1855 as appertaining to a particular estate, it was presumed that the *jalkar* was so settled at the time of the permanent of settlement.

Again, reference may be made to what their Lordships

(1) I. L. R. 14 Cal. 67.

(2) I. L. R. 30 Cal 291 (301 & 302).

(3) I. L. R. 22 Cal. 252.

said in the following portion of their judgment in the case of *Maharaja Jagadindra* (1):—"The Brahmaputra was then as it is now a public navigable river, and if the lands in question, were then part of its bed as they were in 1851 and apparently also in 1838, it is difficult to suppose and it ought not be assumed that those lands were included in the lands permanently assessed in 1793. No Court can properly act on the assumption that in 1793, a state of things existed different from what appears from any evidence before the Court."

Thus the decision in the case of *Maharaja Jagadindra Nath* may be taken to have laid down the following propositions:—(1) That Thak or Survey map can not be treated in all cases as conclusive evidence of what lands were included in a permanently settled estate in 1793; (2) That in the presence of other evidence in support, they may be treated as such [see also *Haradas Acharjya v. The Secretary of State*, 26 Cal. L. J. 590 (603)].

Other points that have been decided by the Privy Council in the case of *Maharaja Jagadindra* (1), are that in every case the question what lands were included in the Permanent Settlement is was a question of fact and not of law, and that the onus lies upon him who affirms that such lands were included in the Permanent Settlement of 1793, and that by the production of the Thak and Revenue Map the onus is not shifted on the defendant.

The above view thus laid down by the Privy Council has been followed in this country in a number of cases, which have been discussed before. See *Ananda Hari Basak v. Secretary of State for India* (2).

The word "**Diara**" has been explained before (see p. 196 *ante*). The expression 'Diara Surveys' means the survey of lands between the main banks of rivers. These surveys were carried on between 1862 and 1883, on the

Diara Survey
Maps.

(1) I. L. R. 30 Cal. 291.

(2) 3 Cal. L. J. 316.

scale of 4 inches to 1 mile in the beds of the Ganges and other large rivers of this part of India. In Bengal, and Bihar these surveys were carried out under Act IX of 1847 for the purposes of a basis of assessment of land which had formed since the last previous survey. Sec. 4 of that Act before its amendment mentioned the dates of revenue surveys of some districts of Bengal, Bihar and Orissa, which were to be considered the period of survey of those districts.

No professional Diara Surveys were made in any river, excepting the Ganges, north of the latitude of Sirajgunge (District Pabna). Non-professional surveys exist for many of the rivers of Sylhet and Eastern Bengal. Copies of the professional Diara Survey Maps are usually available from the Local Director of Surveys. The results of the non-professional surveys are invariably with the District Officers, but in some cases copies are with the Board of Revenue.

"The professionally made Diara Survey Maps are often of the greatest help in the finding of a lost Revenue Survey boundary. They followed, at a reasonable interval of times, in the foot-steps of the Revenue Surveys, and, as they almost invariably included the survey of a narrow tract of high land on each side of the river, it occurs that coincidences between Diara survey and Revenue Survey village tri-junction occur fairly frequently."

In the Revenue Surveys it often occurred that there was no definite connection between the bases of two different districts, divided by a river; for this reason it is often difficult to relay accurately a Revenue Survey boundary, unless the aid of the Diara Surveys can be obtained. Again Diara Surveys sometimes afford a connecting link between the old Revenue Surveys and the Revenue Surveys that might have been executed to-day.

ALLUVION AND DILUVION.

SECTION 5.

5. Nothing in this Regulation shall be construed to justify any encroachments by individuals on the beds or channels of navigable rivers, or to prevent Zillah Magistrates or any other officers of Government who may be duly empowered for that purpose, from removing obstacles which appear to interfere with the safe and customary navigation of such rivers, or which shall in any respects obstruct the passage of boats by tracking on the banks of such rivers, or otherwise.

The above section seems to have been added in view of the supreme importance of preserving the public right of navigation unobstructed in navigable rivers. Rights incidental to navigation have been stated before very briefly (1) in connection with the purposes for which a river is to be deemed a navigable one. The Legislature apparently intended by the enactment of this section that those public rights, should not be interfered with in any way. The Regulation lays down provisions by which the riparian owners on the banks of public navigable rivers become entitled to lands gained from such rivers, but, at the same time, it provides that such right would not entitle them to encroach upon the bed of such rivers or cause other obstructions to navigation. This section also imposes restrictions upon the owners of the banks of navigable rivers not to prevent the exercise of such rights on the riparian banks as the exigencies of the public right of navigation may require.

(1) See p 31 *ante.*)

“Encroachments by individuals on the beds or channels of navigable rivers :—”

The definition of the term “encroachment” in a case where ‘encroachment by a river’ is referred to has been dealt with before (see pp. 131-137 *ante*.) In this section, where *encroachment* by individuals on the beds or channels of navigable rivers is spoken of, the sense conveyed by that word is entirely different. The word *encroachment* here means what is called *purpresture* in the technical phraseology of English law. A *purpresture* is an unauthorised erection in the bed of a navigable river by persons other than the owner of the soil. Purprestures are encroachments by making enclosures, quays, wharfs, piers &c., in the soil, the property of which is vested in the Crown (1). They differ from public nuisances in the sense that they may not violate the public right in all cases. Every structure on the bed of the tidal navigable rivers may not affect the public right of fishery or navigation, yet it is a *purpresture* which is an encroachment upon the demesne land of the Crown. But, when such a structure impairs the public right of navigation, it is a public nuisance. Thus, an encroachment by a structure on the foreshore or in the bed of a tidal navigable river, according to the law of England, may be a purpresture as well as a public nuisance. An unauthorised erection on the foreshore or the bed of a tidal navigable river may be illegal *per se*, without being an actual public nuisance. This view has been laid down in the case of *Attorney-General v. Terry* (2). In that case an information was filed against the defendant for obstructing the navigation of the tidal and navigable river Stour. The defendant, a wharf owner, drove piles into the bed of the river, extending his wharf so as to occupy three

Meaning of encroachment discussed in reference to English law.

Encroachments on the bed, the proprietary right of which is vested in the Crown : English law.

(1) History and Law of the Foreshore and Sea-Shore, p. 45.

(2) L. R. 9 Ch. 423 : 30 L. T. 215. See Coulson and Forbes, p. 499.

feet out of a breadth of about sixty available for navigation ; and it was held by the Court of Appeal, affirming a decree of the Master of the Rolls, that this was such a tangible and substantial interference with the navigation as ought to be restrained by the Court. The Master of the Rolls (Sir, G. Jessel) was of opinion that, independent of any proof of actual obstruction, an injunction ought to be granted, on the ground that no man has a right to build on the bed of a navigable river, and that it is not any answer to say that at the present moment the obstruction is not a nuisance, for it may become so by a change so as to make that part navigable which was not navigable before in any useful sense. His Lordship therefore held that, although an indictment would not lie until an actual nuisance had been committed, a Court of Equity ought to interfere to restrain the continuance of the obstruction.

It would seem, therefore, that any encroachment by a structure upon the foreshore and bed of a tidal navigable river, the ownership of which is vested in the Crown is illegal and may be restrained by injunction at the suit of the Attorney-General, whether it be a nuisance or not. If the act complained of be merely a trespass on the property of the Crown, and not a nuisance to the navigation, the Court will generally direct an enquiry whether it is more beneficial to the Crown to abate the purpresture or to suffer it to remain. But if it be a public nuisance, this can not be done, for the Crown cannot sanction a public nuisance. Erections on the bed of navigable rivers are not necessarily nuisances, but if they obstruct the navigation they may be abated by information and injunction, or by indictment. The true question in each case is, whether or not a damage accrues to the navigation in the particular locality (1).

(1) Law of Waters by Coulson and Forbes (3rd Ed.) p. 720.

Next, a question arises as to what would be the effect of such encroachments by structures, when the bed instead of being the property of the Crown belongs to private individuals. The law of England on this point was unsettled for some time, but now it appears to be settled that if the owner of the bed of a navigable river erect any work upon such bed, such erections are not illegal *per se*, if they cause no actual or probable injury either to the public rights or to the adjoining riparian proprietors (1).

Encroachments on the bed, the proprietary right of which is in individuals: English Law.

In *Bickett v. Morris* (2), the House of Lords held that though each proprietor on the banks of a non-tidal river had a property in the soil of the *alveus* from his own side to the *medium, filum fluminis*, yet he is not entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water or to abridge the width of the stream, but that anything done *in alveo*, which produces no sensible effect on the stream is allowable.

In *Attorney-General v. Lonsdale* (3), the defendant a riparian owner who was also owner of the soil of a public navigable river erected a jetty across one-third of the width of the river. In the suit instituted by an opposite riparian owner, it was held that although the damage proved by the plaintiff was not sufficient to call for the interference of the Court, yet the erection of the jetty which was a solid pier extending fifty-three yards across the river was such an injury to the plaintiff's rights as would justify the Court to interfere without any proof of such damage and that the defendant had no right to erect the works in question, as they might interfere with the navigation of the river, if not at present, yet at some future time.

(1) *Law of Waters*, Coulson and Forbes, p. 100 (3rd Ed.).

(2) L. R. 11 L. Sc. 47 - Coulson and Forbes, p. 101.

(3) L. R. 7 Eq. 377.

In the case of *Orr Ewing v. Colquhoun* (1), the appellants, the owners of the bed of a non-tidal river over which the public had by prescription acquired a right of free navigation, erected a bridge on piers resting on the bed of the river. The Courts below allowed an interlocutor ordaining that the piers should be removed. It was held by the House of Lords in appeal that the piers of the bridge complained of were no actual obstruction to the navigation of the river as prescriptively enjoyed by the public.

From these cases it would seem that the owner of the bed of a public navigable river may exercise all the rights of property in the soil of the bed, provided that he does not in any way interfere with the rights of the public or of other riparian owners. Whether such rights have been interfered with or not would be a question of fact to be determined with reference to the facts of each case (2).

As to encroachments by constructing weirs and by putting up stakes, engines etc. for catching fish, it has been held in England that such encroachments which obstruct the whole or part of the navigation of a public navigable river are illegal and a nuisance, unless a grant by the Crown before the reign of Edward I can be established. Subsequent to the date of Magna Charta erections of weirs on the bed of a public navigable river would be a public nuisance (3). The erection of weirs and any other structure for catching fish in private waters over which the public may have acquired the right of navigation, would also be subordinate to such public rights, and any interference with them would be a nuisance and indictable (4).

(1) 2 A. C. 839.

(2) *Reg v. Betts*, 16 Q. B. 1022.

(3) *Holfora v. George*, L. R. 3 Q. B. 639 : Law of Waters by Coulson and Forbes p. 405 (3rd Edition.)

(4) Law of Waters by Coulson & Forbes, pp. 515-520.

Next, turning to the Regulation it will be seen that the words of the Regulation are, "*Nothing in this Regulation shall be construed to justify any encroachments by individuals on the beds or channels of navigable rivers.*" Now, as has been said before, the beds of navigable rivers are ordinarily the property of Government in this country ; (372-378 *ante*) and according to the provision of the Regulation, it may be taken that the bed of a public navigable river is, in some cases, the property of an individual (see pp. 379-386 *ante*). The above words of Section 5 would go to show that notwithstanding such provision of the ownership of the bed of a public navigable river by an individual, he shall not, by reason of that provision, be entitled to make any encroachment upon such bed, although, it may be his own property. He is to enjoy such property subject to the public rights of navigation. In *Srinath Roy v. Dinabandhu Sen* (1), their Lordships said :— "The flooded land-owner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of navigation." This view apparently indicates that the Legislature by the operation of this section intended to lay down that so far as the question of navigation in navigable rivers is concerned, it is immaterial whether the bed be owned by the public or by an individual. The right of public navigation has been considered to be the supreme right to place all other considerations subordinate to it. This view obviously makes the law under the Regulation similar to that of England which has been discussed before. It would, therefore, follow that erections on the beds of navigable rivers which are considered illegal in England, would also be considered unlawful in this country.

Encroachments on the beds of navigable rivers : Under the Regulation.

Construction of the words of Sec. 5.

Srinath
v.
Dinabandhu.

Encroachments on the beds of navigable rivers in this country as contemplated by Section 5 are public nuisances within the meaning of Section 268 of the Indian Penal Code (Act XLV of 1860). In India, "a person is guilty of a *public nuisance*, who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

"A common nuisance is not excused on the ground that it causes some convenience or advantage." [See also the General Clauses Act (No. X of 1897), Section 3 (44)].

While discussing the meaning of the word *encroachment*, it has been said that it is either a *purpresture* or public nuisance (see p. 687 *ante*.) The public nuisances contemplated by section 5 are therefore evidently unauthorized erections of any structures that may be built on the beds of navigable rivers by the riparian owners, which they are not entitled to justify upon any provisions contained in the Regulation. It would, therefore, seem to follow that in discussing what is an encroachment on the bed of a navigable river, it is only necessary to determine whether a particular case of such encroachment is a public nuisance or not, within the meaning of section 268 of the Indian Penal Code.

Encroach-
ments are
public
nuisances.

*In the matters
of Umesh
Chandra Kar.*

In the matter of the petition of *Umesh Chandra Kar & another* (1), the facts were shortly the following :—The accused were charged at the instance of a Sub-divisional officer (of District Burdwan) under Section 283 of the Penal Code with causing obstruction to the public by raising a bamboo stockade for the purpose of

fishing across the whole breadth of the Bharu, a tidal navigable river, close to the ferry at Mirzapur. It was proved at the trial before the Deputy Magistrate that the stockade reached across the river from one bank to the other, that an opening four or five cubits wide near the northern bank of the river was made for the passage of boats, but this passage was kept closed by bamboos, it being opened only when necessary to allow boats to pass through, and that only at the convenience of the people using stockade; that a light was placed on the stockade at night; that the stockade had never been used in former years, and that although the passage was large enough for *dinghies* to pass freely, yet a larger cargo boat could only do so with great difficulty, and several *Manjhis* were called who proved that their boats had been prevented from passing freely over all parts of the river at the point. Upon these facts, the Deputy Magistrate held that the accused had by placing this stockade across the river caused an obstruction and thereby committed an offence under section 283 of the Indian Penal Code. The matter came up before the High Court of Calcutta in its Revisional Jurisdiction and ultimately while discharging the rule, Petheram C. J. said:—

“The first question, and in fact the only question is, whether this is a public nuisance under Sec. 268 of the Indian Penal Code. I do not think there can be the slightest doubt about it myself, because this being a navigable river, the public have a right to navigate over the whole place, and any one who interferes with the free navigation of it without any right to do so commits a public nuisance. It is admitted that this obstruction extends over the whole width of the river with the exception of a small outlet, through which boats can pass by using considerable precaution. Under these circumstances I do not feel any doubt that this is a public nuisance.”

*Jugal Das
Dalal v.
Queen-
Empress.*

The above decision was distinguished and commented upon, in the case of *Jugal Das Dalal v Queen-Empress* (1), where the petitioners were convicted under Secs. 283 and 290 of the Indian Penal Code for causing obstruction in a navigable river by putting up *jags* constructed of trees and dams. Upon an application for revision, the conviction was quashed by the High Court.

It has been held in that case (*per* Prinsep and Ameer Ali, JJ.) that, the mere fact of an encroachment on a tidal navigable river does not necessarily amount to a public nuisance so as to render a person causing such encroachment liable to punishment under section 290 of the Indian Penal Code, but there must be evidence that such encroachment caused one of the results specified in section 268, and that the rule laid down in *the matter of the petition of Umesh Chandra Kar* (I. L. R. 14 Cal. 656) to the effect that any encroachment, however slight, on tidal navigable rivers constitutes an offence under section 290 is too widely stated. Each case should be determined on its own merits and a decision arrived at, as to whether the encroachment has caused an obstruction or not.

In this case there was evidence to show that the *jag* was about 45 cubits long and 20 cubits broad and that it was erected on the silted side of the river where it was about 300 *hats* broad and therefore it did not obstruct the ordinary navigation of the river. Upon these facts, it was held that there was no evidence to show that the accused had caused any danger, obstruction, or injury to any person in any public way or line of navigation, and the conviction under section 283 could not be sustained, and it was further held that the accused could not be convicted under section 290, as there was no evidence of any obstruction to the ordinary navigation of the river.

(1) I. L. R. 20 Cal. 665.

From the above decision of the Calcutta High Court, in *Jugal Dass Dalal's* case it would seem to follow that all encroachments upon the beds of navigable rivers are not nuisances, and such encroachments in order to be indictable must come within the four corners of section 268 of the Indian Penal Code. If evidence adduced in any case fail to bring the erection, complained of within the definition of a public nuisance, or under the provisions of section 283 of that code, they would not be held illegal. In this respect, the law in India differs from the law of England where all erections in public navigable rivers are illegal *per se*. (See pp. 687-688 *ante*). The distinction between the laws of England and India on this point may be further supported by what follows by implication from the words of section 283 of the Indian Penal Code. The section runs thus :—"Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction, or injury to any person in any public way or public line of navigation etc. etc." The words "*public line of navigation*" in the above section would seem to indicate that the obstruction to a person in navigable rivers should be caused in that part of the navigable river which is generally used by the public for the purposes of navigation. But, according to the law of England, it is no answer for a person to say that the part which has been encroached upon by him by causing any erection is not generally used by the public for navigation (see *A.-G. v. Terry*, L. R. 9 ch. 423 *per* Mellish, L. J.). Another point of distinction is also noticeable. In England, an encroachment on the bed of a navigable river, owned by the public is illegal *per se*, whereas encroachment on such a bed owned by a riparian owner is to be established illegal by proving that such encroachment has interfered with

Points of
distinction
between the
laws of
England and
India in this
respect.

the public or private right. But, in this country, it would seem, that the ownership of the bed of a public navigable river by an individual would not make any difference in the application of the law, as the words of section 5 of the Regulation clearly indicate (see p. 691 *ante*).

Beds or Channels of navigable rivers :—Disputes may sometimes arise as to the question whether the encroachment complained of is on the bed or channel, or upon the bank of a navigable river. If it lies upon the bank, it may not be a public nuisance. To determine the point it would be necessary to refer to what is meant by the bed or bank of a river, which has been discussed before (see pp. 19 & 41 *ante*).

“Or to prevent Zillah Magistrate or any other officers of Government, who may be duly empowered for that purpose, from removing obstacles which appear to interfere with the safe and customary navigation of such rivers” :—

This section, as said before, has been enacted to prevent the riparian owners from using the adjoining beds of public navigable rivers in a way which may interfere with the public rights in such rivers. In construing the part of the section, quoted above, the beginning words of the section.—“Nothing in this Regulation shall be construed” should be read before that portion. Now, one of the provisions made by the Regulation declares that if the channel between the riparian bank and an island in a public navigable river become fordable at any season of the year, the island shall be considered an accession to the riparian bank, (see Part II, Class III, Section 4) The provision thus made by the Regulation would not entitle a riparian owner to exercise such acts of possession in the channel intervening as might interfere

with safe and customary navigation over it. This is apparently the significance of the words:—"Nothing in the Regulation shall be construed" (to prevent Zillah Magistrate or any other officer, etc. etc.)

As regards obstacles in public navigable rivers, where no question of private ownership may be raised, it may be treated as an obstruction on the public high way. In England, it is a public nuisance and it can not be abated by a private individual except in a peaceable manner or except when he suffers a special injury beyond that what is suffered by the rest of the public (1) In the case of *The Mayor of Colchester v. Brooke* (2), it has been held, that if the oyster heds are placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing; for an individual can not abate a nuisance if he is not otherwise injured by it than as one of the public. In the case of *Dimes v. Petley* (3), where the vessel of the defendant struck and tore away the jetty of the plaintiff which projected into the river within the flow of the tide, it was held that the defendant was not justified in running his vessel against the wharf of the plaintiff and that a private individual could not justify damaging the property of another on the ground that it was a nuisance to the public right unless it had done him a special injury.

Removal of obstructions to navigation English law.

Public nuisances can not be abated by a private individual.

But if the obstruction is caused to a private right or right of property, in a navigable river, such as the right of access to a wharf or the bank from the navigable rivers, an action will be maintainable without proof of special damage.

(1) *Benjamin v. Storr*, L. R. 9 C. P. 400; *Winterbotham v. Derby*, L. R. 2 Ex. 316.

(2) 7 Q. B. 339.

(3) 15 Q. B. 283.

When a private proprietor can remove obstruction by a suit for injunction without proving special damage.

In the case of *Lyon v. Fishmonger's Co.* (1), the plaintiff appellant, who had his wharf on the Thames bounded by the river on the south, and by a creek of the river on the west, and had, also from time immemorial a right of access to his wharf both from the main river and the creek, instituted the suit for restraining the defendant respondent from constructing an embankment which had the effect of obstructing the appellant's right of access. Malins, V.C., granted the injunction prayed for, but Lord Justice reversed the decree. On appeal, the House of Lords reversed the judgment of the Lord Justice and confirmed the decree of Malins, V. C., and in that case Lord Cairns, L.C., regarding the question of obstruction said :—"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands in the banks, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, or other members of the public who have no access to or from the river at the particular place ; and it becomes a form of enjoyment of the land ; and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction." In the case of *Rose v. Groves* (2), the plaintiff, a riparian owner who had a public house on the Thames, complained that the access to and from the river was obstructed by the defendant wrongfully and maliciously placing and keeping timber in the river, so as to drift opposite the

(1) 1 A. C. 662 (671).

(2) 5 M. & G. 613.

plaintiff's house. In this case it was held that as this was an injury to private right, proof of special damage was unnecessary to support the action.

It follows from the decision in the above case of *Lyon v. Fishmongers Co.*, (1) that an obstruction to a private right in a navigable river may be removed by injunction at the suit of an individual whose right is interfered with, without proof of any special damage to such private individual.

In cases of obstructions to navigation which are public nuisances, any member of the public who is specially injured may institute a suit for removal of the obstacles by injunction with proof of special damages. In the case of *Original Hartlepool Colliers Co., v. Gibb* (2), each of the parties, the plaintiff and defendant, had a wharf abutting on the river Thames. Vessels brought by the plaintiffs for unloading coals used to overlap the wharf of the defendant. The defendant with a view to prevent the access of such vessels attached a large wooden obstruction by iron chains to the extremity of his wharf, which used to float in the river and was thus a public nuisance. Jessel, M. R., held that special injury to the plaintiff was apparent and in that view he granted a perpetual injunction.

Removal of an obstruction to public navigation by injunction at the suit of a riparian proprietor specially injured.

An obstruction to navigation which is a public nuisance may be removed by *indictment* or *information* in the name of the Attorney-General. Any person may put the Criminal Law in motion against an alleged offender, and may therefore apply for an indictment against those whom he charges with causing a nuisance. In the case of most nuisances, the proceedings are instituted under the common law, and not regulated by statute. The informer may in such cases prefer his bill direct to the Grand Jury at Assizes or Quarter Sessions, without any preliminary proceedings before Justices, and without

(1) 1 A. C. 662.

(2) 5 Ch. D. 713.

any leave from the presiding Judge. He is, however liable for all costs if he proceeds in this way. If there is a conviction the Court may impose such fine as it deems suitable and may, also as part of its judgment, order the nuisance to be abated (1).

By
information
filed by the
Attorney-
General.

An *information* by the Attorney-General may be instituted by him of his own motion, but more usually it is initiated by some person aggrieved, who, as relator, asks for the sanction of the Attorney-General (2). If the Attorney-General is simply proceeding on behalf of the public, the result of a successful information is an injunction to restrain the continuance of the nuisance (3). In cases of failure he becomes responsible for costs (4). If the Attorney-General proceeds at the relation of a private person or a corporation, he takes the proceeding as representing the Crown, and the Crown through the Attorney-General is really a party to the litigation. But in such cases the relator would be responsible for costs (5). It is open to the relator to join the claim for damages with the claim for injunction by the Attorney-General, and an action commenced by an individual on his own behalf may by amendment be turned into an action and information in which the two claims are joined (6). A *relator* need not have any personal interest in the matter except as one of the public: he need not in fact, be himself damaged at all (4).

In India, the remedies prescribed by the law for removal of obstructions appear to be similar to those provided by the Law of England. In this country, also, no civil suit is maintainable in respect of a public

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- (1) *Law of Waters*, by Coulson and Forbes. pp. 711-712.
 - (2) R. S. C. O. 15, Rule 20.
 - (3) *A. G. v. Shrewsbury Bridge Co.* (1882) 21 Ch. D. 752.
 - (4) *A. G. v. Logan* (1891) 2 Q. B. 100 (103).
 - (5) *Ibid.* p. 106.
 - (6) *Caldwell v. Pagham Harbour R. Co.* (1876) 2 Ch. D. 221.

nuisance at the instance of an individual, who suffers no special damage in excess of what is suffered by all the members of the public. The law on this point is apparently borrowed from the law of England and there is an unanimity of opinion in this respect among all the High Courts of India. See *Blugeeruth v. Chundee Churn* (1); *Raj Luckhee v. Chunder Kant* (2), *Mahomed Alam v. Dilbar Khan* (3); *Satku v. Ibrahim Aga* (4), *Kazi Sujaudin v. Madhabdas* (5), *Karim Baksh v. Budha* (6), *Ramphal Rai v. Raghunandan* (7); and *Adamson v. Arumugam* (8).

In India no civil action for removal of obstruction to navigation is maintainable by an individual without proof of special damage.

The Indian Penal Code (Act XLV of 1860), by section 283 and 290, having declared, that all obstructions to public navigation are public nuisances and they are thus offences punishable under that Act, it would seem clear that a criminal case may be instituted by any member of the public by preferring a complaint to a proper Magistrate against a person who by doing any act or by omitting to take order with any property in his possession or under his charge causes obstruction to navigation.

Prosecution in the Criminal Court may be proceeded with upon a complaint by a member of the public.

Every District Magistrate or Sub-divisional Magistrate or any other Magistrate of the first class, empowered on this behalf by the Local Government on receiving police report or other information may initiate proceedings under Chapter X (Public-Nuisances) of the Code of Criminal Procedure (Act V of 1898) for removal of unlawful obstructions or nuisances from any river or channel which is or may be lawfully used by the public.

Criminal proceeding for removal of public nuisances may be initiated upon information.

Now, before the above provisions of the Criminal,

(1) 22 Suth. W. R. 462.

(2) 14 Suth. W. R. 173.

(3) 5 Cal. W. N. 285

(4) 1 L. R. 2 Bom. 457.

(5) 1 L. R. 18 Bom. 693

(6) 1 L. R. 1 All. 249.

(7) 1 L. R. 10 All. 498.

(8) 1 L. R. 9 Mad. 463.

Jurisdiction
of Criminal
Courts may
be ousted by
the existence
of *bona fide*
civil disputes.

Law can be applied to any acts or omissions of a riparian proprietor which may amount to an obstruction to navigation, it would be necessary to inquire whether the acts or omissions mentioned in these provisions exclude acts or omissions which the riparian proprietors are entitled to do or abstain from doing in lawful exercise of their rights ; in other words, would it be within the competence of the Criminal Court, to interfere, if the lawful exercise of the rights of the riparian owners amount to an obstacle to navigation ? The words "Nothing in the Regulation shall be construed" "to prevent Zillah Magistrate &c. &c." used in Sec. 5, of Regulation XI of 1825 may seem to support an answer in the affirmative ; because those words only confer rights to alluvial accretions, contiguous accrescion, and *churs* upon the riparian proprietors by the provisions of the Regulation, and do not authorize them to make an encroachment on the beds (as stated at p. 691 *ante*.) or to create obstructions to navigation (as discussed at p. 696 *ante*) which District Magistrates or other Magistrates will not be able to remove. In fact, the words of Section 5 seem to show that this section has been enacted only to declare that the provisions contained in the Regulation shall not stand in the way of the application of the Criminal Law of this country to offences, relating to obstructions to navigation whether by encroachment on the bed or by any other means. However, the words "Nothing in the Regulation shall be construed" &c. &c. would not be an insurmountable bar, as other rights possessed by the riparian proprietors in respect of the riparian banks have not been discussed by the Regulation, nor have they been expressly given to such proprietors by it. Those rights may, therefore, resist the application of the Criminal Law

It is a well-known general principle of law that there can be no criminal offence if a man acts in lawful exer-

cise of private rights. In the case of *Jugal Das Dalal v. Queen-Empress* (1), the Calcutta High Court observed :—
 “We may observe that there are circumstances well-known to us in connection with large navigable Indian rivers which would render it desirable, if not absolutely necessary, to permit some encroachment from the banks for the protection of the property of private parties, such as the erection of spurs to prevent diluvion.” A riparian owner on the bank of a navigable river, the bed of which is owned by him, may put up stakes on the bed adjoining the bank to protect his bank from diluviation or erosion of the river, and such stakes may interfere with the public navigation in a technical sense ; yet such riparian owner would not be guilty of an indictable offence. The second paragraph of section 133 of the Code of Criminal Procedure says that the obstructions in a river or channel to be dealt with by the provisions of that section should be “unlawful.” Erections of stakes on the bed of a navigable river to protect the riparian bank by the owner of the bed are an act in lawful exercise of the ownership of the bed (2), so there is nothing “unlawful,” to attract the operation of that section. If sufficient room is left for navigation, it would be a question of fact whether it is an obstruction in the “public line of navigation” as referred to in Sec. 283 of the Indian Penal Code. This will apparently give rise to complicated questions of civil rights. The public right of navigation over private rivers may be acquired by immemorial user or prescription ; in such cases it is open to the owner of the bed to insist upon the public to follow the *line* over which right has been acquired (3). If the public right of navigation in such a river is a condi-

Instances of
lawful
exercise of
rights by
riparian
proprietors.

(1) I. L. R. 20 Cal. 665 (669).

(2) *Do. dem Seebkrsta v. The East India Company*, 6 Moo. I. A. 267.

(3) Law of Waters by Coulson and Forbes, p. 515 (3rd Edition.)

tion, of the grant of the ownership of the river bed, then, questions might arise whether that condition is satisfied by leaving sufficient room for public navigation. Questions like the above would therefore involve *bonafide* disputes of title, which would oust the jurisdiction of the Criminal Court. The law that should be followed in such cases is similar to what has been adopted in cases of civil disputes raised in the course of the proceedings under section 133 of Cr. P. Code in respect of an obstruction to a public high way, (1). In this connection, reference may, also, be made to the cases of land gained from a public river by artificial means. In these cases, also, no question of public nuisances may arise, when the artificial means are adopted in lawful exercise of the rights of a riparian proprietor (see Alluvion, Natural and Artificial, pp. 105-112 *ante*). See also *In re Maharana Shri Jaswatsangji* 2; *Zaffer Nawab v. Emperor* (3); *Murad v. Emperor* (4); and *Budha v. Mohan Lal* (5).

Removal of obstruction at the suit of the Advocate General or two or more persons with his consent.

A riparian owner, who suffers a special damage in excess of what is suffered by the public generally by reason of an obstruction to public navigation, may institute a suit for removal of such obstruction by injunction under the provisions of Act No 1 of 1877 although an order may have been made by the Magistrate under the provision of the Criminal Law: *Chuni Lal v. Ram Kishen* (6). Such a suit by him will not be maintainable, without proof of any special damage (see pp. 700-701 *ante*). But if the suit be instituted by two or more persons after having obtained the consent in writing of the Advocate General, special damage need not be proved. The law on this point in

(1) *Queen-Empress v. Bissessur Sahu*, 1 I. L. R. 17 Cal. 562; *Dularam Deb v. Baishnab Charan*, 10 Cal. W. N. 845; *Dharam Mandal v. Gossau Das*, 14 Cal. W. N. 544.

(2) I. L. R. 22 Bom. 988.

(3) I. L. R. 32 Cal. 930.

(4) 1903 Punj. Rec. 2.

(5) 16 Ind. Cases 162.

(6) I. L. R. 15 Cal. 460.

India seems to be similar to that of England. In India also a suit for removal of a public nuisance, such as an obstruction to public navigation, may be instituted by private persons though no special damage has been caused, under the provisions of Sec. 91 of the Code of Civil Procedure (Act V of 1908), as in England. The Advocate General, in this country, also, like the Attorney-General in England, may institute such a suit of his own motion: but, in England, as stated before (see p. 700 *ante*), persons who have suffered special damage from a public nuisance may join the Attorney-General as co-p'aintiffs in a suit brought by him at their relation, and the Attorney-General may claim injunction and the persons specially damaged may claim damages: *Attorney-General v. Logan* (1. Section 91 of the Code of Civil Procedure appears to support such a procedure in India. With regard to the responsibility of the costs in the suits of the above description, the rule adopted in England would be applicable to India.

"Customary Navigation":—Having regard to the fact that the words "custom" and "usage" have been used in this Regulation frequently, in the sense of a common course of conduct which has been adopted in practice by the people of a particular locality repeatedly for a long time, it would be reasonable to hold that *customary navigation* in Sec. 5, means the right to navigation which has been acquired over a particular river by custom or immemorial user (see p. 204 *ante*). This interpretation would evidently refer to the public right of navigation over private rivers. In large public navigable rivers in this country which are navigable by all His Majesty's subjects, in all their parts, no question of any *customary navigation* can possibly arise, as no body could ever possibly think of establishing the public right of navigation in rivers, like Ganges and Meghna

in Bengal, by custom and immemorial usage. Such rivers are public property and the ownership of them is vested in the Government representing the Crown in this country. If the public right of navigation over private rivers acquired by custom, is meant by the expression "customary navigation," then, the owners of the beds of such rivers will have a right to insist upon the public to navigate over the particular portion of the river along which the public have been accustomed to pass and repass, as in the case of a right acquired by, immemorial user or prescription (see p. 703 *ante*). This view may account for the expression "*public line of navigation*" used in Section 283 of the Indian Penal Code. The expression "customary navigation" may also refer to the means of conveyance by which, the people are accustomed to carry on navigation in such rivers. If the river be so small as to be capable of being navigated only by boats, and if by boats alone the people are in the habit of carrying on navigation in such a river, then, "customary navigation" in such a river would mean the right of navigation prescriptively enjoyed in vessels of that kind, so that if the riparian owners of the banks erect a bridge over such a river allowing passage for boats to pass and repass, such an erection would not be considered an obstacle to navigation within the meaning of Sec. 5 of Regulation XI of 1825, in view of the fact that it might obstruct the passage of a steamer (1).

When public benefit is a good defence in a case for obstruction to navigation.

Justification of obstructions to navigation:—
Next, it becomes necessary to discuss the circumstances under which actual obstructions to navigation may be justified. It has been said that, in England, the determination of the question whether an obstruction is a nuisance or not, will depend upon the decision of the point whether it produces public benefit or not; not giving the term "public benefit" too extended a sense

(1) See *Orr Ewing v. Colquhoun*, 2 A. C. 839.

but applying to the public frequenting the place where the obstruction has been caused.

In the case of *Attorney-General v. Terry* (1), Jessel; M. R., after referring to the contrary views expressed in *R. v. Russell* (2) and *Rex v. Ward* (3), made the following observations regarding the term "public benefit" which would be a good defence to actions arising out of obstructions to navigation, whether civil or criminal:—"Then, it may be asked, what is a public benefit in my view? I say it is a benefit of a similar nature, showing that on the balance of convenience and inconvenience the public at that place not only lose nothing, but gain something by the erection. There are two cases in the books which will illustrate my meaning, and, I think fairly show what sort of public benefit it is. The first is this. In the case of a tidal harbour of irregular shape, it may be desirable to straighten the sides, the result of which would be, of course, in the parts, where you take away the water-way, to diminish the area usable for navigation; in those parts where you add to the water-way you would increase the area. If, in the course of this straightening, the whole of the harbour is made larger and commodious, then, I think, the public benefit gained at the particular point where the navigable water is narrow overbalances the public injury, and, in that sense, the improvement of the harbour would not be a nuisance: and that is what I understand Lord Hale intends to say in the passage which has been referred to. Another case is this, which also appears in reported cases: Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river,

(1) L. R. 9 Ch. 423: 30 L. T. 215.

(2) 6 B & C 566; 30 R. R. 432.

(3) 4 A & E. 384 (404): 43 R. R. 364.

and, of course according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the water-way, and to some extent, perhaps to a more or less material extent, obstruct the navigation. But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury if injury it be, to the navigation, that on the whole, a Court of Justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case, also, it would be a public benefit that would counterbalance the public injury. I give those as illustrations, but I think it must be confined, as put by Sir William Follett in his argument, to cases of public benefit, and not used in too extended a sense."

Thus, it would appear that the public benefit would be a good defence, when the benefit conferred upon the public by the obstruction complained of counterbalances the public injury.

Obstruction
authorized
by statute.

Where the obstruction of the public right of navigation is authorized by statute, no action will lie for damages caused by the due execution of the works authorized by the statute; but if the persons so authorized exceed their powers or are guilty of negligence in carrying out their works, they will be responsible for damage so occasioned (1).

In India, so far as criminal cases are concerned, it would depend upon the construction of section 268 of the Indian Penal Code, specially of the last portion of that section which runs thus:—"A common nuisance is not excused on the ground that it causes some convenience or advantage." Referring to that passage in

(1) *Cracknell v. Thetford*, L.R. 4 C. P. 629: Law of Waters by Coulson and Forbes, p 510.

Sec. 268 of the Indian Penal Code, Mayne in his commentaries on the Criminal Law of India says :—"Nor is it any answer that the injury to the public is more than counterbalanced by the benefits resulting from the act or omission complained of to the general community or to the locality itself (1)." The opinion expressed by the learned commentator is apparently based upon the decision in *Rev v. Ward* (2), where Lord Denman, differing from the law laid down by Bayley, J. in *Rev v. Russel* (3), has held that it is no defence to an indictment for obstructing a navigable river that though the work be in some degree a hindrance to navigation, it is advantageous in a greater degree. It appears from the view expressed by Sir. G. Jessel (see pp. 707-708 *ante*) that the law laid down by Lord Denman has undergone a change and it would seem to be the accepted view now in England that if the public benefit arising from an obstruction to navigation counterbalances the injury, the obstruction would not be indictable. There does not appear to be any intelligible reason why the same view will not be followed in India.

"Or which shall, in any respect, obstruct the the passage of boats by tracking on the banks of such rivers or otherwise" :—

The plain meaning of the above portion of section 5 seems to be this that nothing in this Regulation shall be construed to prevent Zillah Magistrate or any other officers of Government who may be duly empowered for that purpose from removing obstacles which shall in any respects obstruct the passage of boats by towing on the banks of such rivers, or otherwise. Any obstruction that may be caused by the riparian owner to the right of passage over the banks of a navigable river

Right of
towing on
the banks of
navigable
rivers.

(1) Criminal Law of India, by J. D. Mayne, Part II, Chapter VIII, § 390. (3rd Edition).

(2) 4 A & T 384 : 43 R. R. 364.

(3) 6 B & C 506 : 10 R. R. 432.

for the purpose of towing vessels, may be removed by a Magistrate duly authorized on this behalf. By this provision, the Regulation evidently means to declare that the public will have the right of towage on the banks of a navigable river, an obstruction to which will be removed by a Magistrate acting under the provisions, of Chapter X of the Code of Criminal Procedure (Act V of 1898). This provision obviously curtails the right of ownership of the banks of a navigable river and imposes a criminal liability for causing obstruction to the towing path along the banks. To appreciate this position it would be necessary to discuss the following topics :—

Owership of
river banks.

Roman Law.

Ownership of the banks of navigable rivers :— While dealing with the various definitions of the word *bank* (see pp. 51-54 *ante*), the ownership of the banks of non-navigable rivers has been discussed, but the question relating to the property in the banks of navigable rivers has been left undetermined. In that part where the topic of Dereliction under the Roman Law has been dealt with (144-148 *ante*) it had been said that Roman Jurists recognized the public right of use of the river flowing over a bed belonging to the owners of the adjoining banks and that according to that law there was always a presumption of ownership of the bed in favour of the riparian owners. In like manner, the ownership of the banks under the Roman Law was presumed to be in the owners of the adjoining lands, subject to the public use of navigation (1). This view will be apparent from the law laid down in the Institutes of Justinian :—

“By the Law of Nations, the use of the banks of a river is public, just as is that of the river itself. Thus every one has a right to bring his vessel to the bank to tie ropes to the trees that grow there, or to place

(1) A Summary of the Roman Civil Law by Colquhoun, § 924, Vol. II.

any portion of his cargo on it, just as much as he has right to navigate the river itself. But still, the property of the banks is vested in those who are proprietors of the land which adjoin, for which reason, the trees which grow upon them belong to those proprietors." (1).

According to the law of England, the banks of navigable rivers are not *publici juris* but remain private property. (2)

English Law.

The law in America seems to be different in different States. In some States the banks of a navigable river are regarded as private property subject to the exclusive appropriation of the owner, and in others, the banks of a navigable river are regarded as public high ways although owned by private individuals.(3)

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In this country the ownership of the banks of navigable rivers is generally vested in private individuals, as was held by Sir Richard Couch, in the case of *Roop Lall Dass v. The Chairman of the Municipal Committee of Dacca* (4), where the learned Chief Justice said thus :—' The doctrine upon which the Appellate Court has decided the case that the bank of a river is public property and that a private individual can not have a right in it is not the law. The bank of a river may be and constantly is private property.'

Under the Regulation.

In this connection a distinctive feature of the law of England relating to the "*Foreshore*" is to be noticed particularly. According to the English Law, three things are to be considered distinctly in a tidal navigable river, namely, the *bank*, *foreshore* and *bed*. The definitions and limits of them have been discussed before (see pp. 43, 50, 56 and 89 *ante*). The law relating to the property in the beds of rivers has been

(1) The Institutes of Justinian, Book II, Title I, sec IV, by William Graphel p. 51.

(2) Law of Waters by Coulson and Forbes, p. 495.

(3) Law of Watercourses by Angell § 553. (4) 22 Suth. W. R. 276.

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(2) Law of Waters by Coulson and Forbes, p. 495.

(3) Law of Watercourses by Angell § 553. (4) 22 Suth. W. R. 276.

dealt with already with reference to the ownership of islands in public navigable rivers (see pp. 367-368 *ante*). As to the ownership of the "*foreshore*," reference may be made to the discussion relating to the ownership of the sea-shore dealt with before (see pp. 56 & 57 *ante*). It has been stated there, that the shore of the sea between the high and low water mark belongs to the Crown and the principle which gives the shore to the Crown has also been discussed. The shore may form a parcel of the adjoining manor and may so pass by grant from the Crown to a subject. According to the law of England, no distinction appears to have been made as to the ownership between the shore of the sea and of a tidal river (1). The shore of a tidal river will evidently be the *foreshore*, that is, the space between the high and low water mark, the ownership of which *prima facie* is vested in the Crown. It may belong to a subject by ancient grant or charter from the Crown or by prescription. This ownership of the Crown is for the benefit of the subject and can not be used in any way as to derogate from or interfere with the public right of navigation and fishery (2). A grant of land by the Crown on the banks of a tidal navigable river will *prima facie* be bound by the line of high water mark, but by evidence it might be shown to include the fore-shore as well (3). But a grant of land on the banks of non-tidal navigable rivers which are called private rivers will be presumed to have intended to pass the bed of the river *usque ad medium flum*, in the absence of any evidence to the contrary (4).

Presumption
of law relating
to the grants
of land on
tidal rivers.

Next, as to the ownership of the banks of a tidal navigable river, which mean the land above the line

(1) *Duke of Bridgewater v. Bootleum-Linacre*, 1 R. 2 Q. B. 4; *Bhundell v. Catterall*, 5 B. & Ald. 268; *Law of Waters* by Coulson and Forbes, p. 97.

(2) *Law of Waters* by Coulson and Forbes, p. 23.

(3) *Ibid*, p. 97-98.

(4) *Ibid*, 117-119.

of high water mark, it seems to be established in England that such banks belong to adjoining owners and not *publici juris* (1) as said before.

Now, a question arises, whether the grant of land bounded by a public navigable river in this country is to be construed in the light of the presumption of the English law, namely, that such grant shall be presumed not to have included the *foreshore*, in the absence of any evidence to the contrary. It would seem, at the outset, reasonable to hold that presumption of the English law, which is founded upon the peculiar state of things which prevailed in England, in connection with the grant of *foreshore* by the Crown to private individuals, should not be applied to a country where the conditions of things, physically and historically are entirely different. Even in that country the *prima facie* theory was not known till its invention by Thomas Dogges in the reign of Elizabeth (2) before which the presumption of law was that the manors of the subjects went to the low-water mark. In England, the grant of the foreshore is associated with valuable rights, such as taking wreck, and royal fish, exercising the right of several fishery by weirs and fixed engines upon the foreshore, of mining, digging, and taking sand, seaweed etc., taking salvage for grounding ships and embanking and inclosing, punishing purprestures, and others. Evidence of the exercise of these acts on the shore of the sea as well as of a tidal river may prove the lost grant of the foreshore. At one time there was a belief among the Judges evidently under the influence of Charles I, as suggested by Stuart Moore (3), from the time of Hale downwards that scarcely any of the foreshore had been granted out by the Crown, and that the claims in almost every case

Whether such presumption applies to estates granted at the Permanent Settlement in Mufassil.

The *prima facie* theory of the ownership of the foreshore in England has a special history of its own.

(1) *Lowe v. Govett*, 3 B & A. 813 : 37 R. R. 560.

(2) History and Law of the Foreshore by Stuart Moore, Introduction.

(3) *Ibid.*, pp. XXXI—XXXII. (3rd Edition).

was based upon usurpation (1). To this, the restrictions regarding alienations of Crown lands may be added. Reasons like these may, very well, be taken to have induced the Judges in England to lay down a theory of presumption of law which is now applied to construe the Crown grants upon the shore of a tidal river. Lastly, reference may be made to Statue law (2) which was passed in the reign of Queen Anne prohibiting, the alienation of Crown lands including the foreshore.

Reasons why
the *prima
facie* theory
could not be
applied to
this country.

But, in this country, land tenures have got a special history of their own. Take the case of Bengal where the system of Permanent Settlement prevails. At the Permanent Settlement, Parganas, independent Talooks, and other estates bounded by a public navigable river were recongnized as private property and it was optional with the Government to settle the bed of such a river with the zemindar, independent Talookdars or other actual proprietors as part of their permanently settled estates. In some cases, this course was adopted (see pp. 435-436 *ante*), and in others, the bed remained public property. In regard to these cases where the bed has been granted as part of a permanently settled estate, the question of the ownership of the *foreshore* does not arise, although such rivers may be tidal, with which the word *foreshore* is associated (see pp. 89-90 *ante*); because in such cases, the ownership of the bank and bed having vested in private persons, the property in the *foreshore* which is a part of the bed, also passes to the riparian owners. As to the cases where the bed is a public property, the question of the ownership of the *foreshore*, if the river be tidal, may arise, if the theory of the Common Law of England applies to such rivers (3). But the enormous powers of disintegration

(1) History of the Foreshore, by Stuart Moore, pp. 650-651.

(2) 1 Anne, c. 7, s. 5; Doe d. R. v. Archbishop of York, 14 Q. B. 81.

(3) P. 90 *ante*.

and transformation of the lands on the banks, possessed by the rivers of this country, make it impossible to determine the space which was *foreshore* at the time of the grant, and in most cases, such *foreshore* would be in the lands of the riparian owners themselves or in the land which has accreted to the estate granted. According to the law of England the line of the *foreshore* may vary with the recession or encroachment of the river provided that such recession or encroachment be by imperceptible degrees, otherwise the old boundary line continues (1). Now, if an attempt is made to apply the above theory of the law of England to the cases of this country, the result obtainable will not support the view that the ownership of the new *foreshore* in such cases is in the Government representing the Crown. It is said that in cases of sudden encroachments the old line of boundary between the territory of the Crown and that of the riparian proprietor continues, (see p. 137 *ante*) consequently, the new *foreshore* left after sudden diluviation in the land of the riparian owner is not the property of the Crown. Again, it is the established law in this country that the property of the original owner continues in the diluviated site, (see pp. 540-542 *ante*), hence the ownership of the new *foreshore* between such site and the new bank can not vest in the Government, on the presumption that the ownership of the estate granted at the Permanent Settlement extended to the high water mark and not to the low water mark.

Besides the above difficulties, the repeated measurements of the lands on the banks of rivers in this country on the occasions of the Thak and Revenue Survey and other surveys hardly leave any room for the application of the presumption of the English law for the purpose of determining the limits of any permanently settled estate bounded by a river.

(1) See pp. 57 & 137 *ante*,

Again, in this country, a tidal river may be non-navigable (see pp. 23 & 26 *ante*), the bed of which according to the law of the country is generally owned by private individuals; in such cases, the question of the ownership of the *foreshore* can not arise, because the ownership of the banks and bed are vested in private proprietors.

From the discussions set forth above, it would seem to follow that in this country in cases of tidal navigable rivers, no special attention need be paid to the question of the ownership of the *foreshore*, which is associated with many valuable rights in England, and for all practical purposes the ownership of estates is taken to extend to the low-water mark, as the acts of ownership over the space between high and low-water mark exercised by the riparian owners will, invariably in all cases, establish their possession of it since the Permanent Settlement.

Cases supporting the view of English Law were decided by the Original side of the Calcutta High Court.

Gangadhar Sirkar v. Kashinath Biswas.

In the case of *Gangadhar Sirkar v. Kashinath Biswas* (1), which was a suit for specific performance of a contract, one of the grounds the defendant urged as entitling him to rescind the contract, was that the land agreed to be sold included land lying below high-water mark. Phear, J., in delivering his judgment, said:—"All he says is in effect this, namely, that the land by its situation is such as must belong to the Crown, and therefore the plaintiffs can not pass it to him. Probably if there were a question between the present vendors as riparian proprietors and the Crown or any one representing the Crown as to the precise line where river-ward boundary of the vendor's property ran, it would be a presumption in favour of the Crown that that boundary lay along the line of medium high-water, as defined by Alderson, B., in the case which I referred to during the argument (*Att-Gen v. Chambers*, 4 Deg. M. & G. 206). But there

is nothing, so far as I am aware, in the shape of an impossibility that a riparian proprietor in India should drive from the Crown itself such property as the Crown may have in the *foreshore* of a tidal river or sea. In England, undoubtedly, the Crown has always had the power of making a grant of the foreshore to private individuals, subject only to the condition, since Magna Charta, that the rights of the public must remain undisturbed ; and I believe I am correct that in England a very large portion of the *foreshore* is owned by private proprietors. As between the vendors and purchasers in this case, I have no reason for supposing that the vendors have not quite as good a title to the land below as to that above high-water mark. What the nature of that title is I do not know, for the defendants have not questioned it before me ; on the other hand, I have that which the defendant has made evidence in the case, though it might not have been so otherwise tending greatly to show that the plaintiffs are the owners of the *foreshore*, for the defendant in his requisition and again in his witness-box, has appealed to the Collector's Chitta, and in the Collector's Chitta, the lot of which the vendors are undoubtedly proprietors, so far at least as high-water mark, is represented as extending to low-water mark." This view was affirmed on appeal. In this case The Collector's Chitta showed that the grant extended to low-water mark.

In the case of *Doc dem Seebkristo v. The East India Company* (1), it has been held that the East India Company as representing the Crown have a freehold in the land between high and low-water mark.

*D. dem
Seeb Krista
v.
East India
Co.*

In regard to the above cases, it may be observed that they are Calcutta cases where the Common Law of England can be applied, and in Mofussil cases the Common Law has no application (see p. 26 *ante*).

(1) 6 Moo. I. A. 267.

As to the question whether the *prima facie* theory is a Common Law right, it can be said that it is evidently a disputed proposition of law, as Stuart Moore in his History and Law of the Foreshore points out (1). But it is not of much importance to discuss his view when it appears that in England it is generally presumed that the ownership of the *foreshore* is vested in the Crown.

In support of the view urged in this book, reference is to be made to the decisions cited under the next head.

Rights and liabilities in relation to the ownership of the banks of navigable rivers :—In discussing of the right of the riparian owner on the banks of a navigable, (S. C.) Mitter and Caspersz, JJ., would seem to have upheld the view that in Mofussil the common law rule that the ownership of the *foreshore* is vested in the Crown has no application, although they did not say so, in so many words. The view of the learned Judges would appear from the following portion of their judgment delivered in the case of *Dindayal Mazumdar v. Emperor* (2). "*Prima facie*, the owner of the soil is entitled to the fullest use of it and to prevent its use in any way by strangers. By contract or custom his *prima facie* right may be detracted from, but the reason of such detraction must be proved. The rights, however originating and claimed against the proprietor must be established. If the proprietary right be denied, as in this case it has been with respect to the foreshore, the right must be established, but the right to the foreshore is a riparian right, and ordinarily goes with the land above and, except as to certain well recognised rights appurtenant to the navigation, etc., the proprietary right is seldom capable of denial. As held by Morris and Tottenham, JJ. in *Dhunput Sing v. Dinabandhu Guha* [(1881) 9 Cal. L. R. 279], the master of the petitioner had

Rights which riparian owners on the banks of navigable rivers are entitled to exercise.

Right to the *foreshore* is a riparian right.

Dindayal
v.
Emperor.

(1) See pp. 713-714 *ante*.

(2) I. L. R. 34 Cal. 935 (1939).

prima facie the right to prevent *khuntagari* or to levy cesses for *khuntagari*." In the above case of *Dindayal* the zemindar of Jhikra on the river Karatia in the District of Pabna, who claimed to be the owner of the bank and foreshore, demanded certain cess from the traders under the heads of *khuntagari*, *samati* and *dalali*, and it was held by the Calcutta High Court that there was nothing illegal in such demand. In the case of *Dhunput Singh v. Denobundhu Guha* (1), there was a claim for recovery of charges called *khuntagari*. The Courts below dismissed the suit holding that such a claim was opposed to public policy. In second appeal, while reversing that decision, Morris & Tottenham, JJ. said :—" We can not agree with the lower Court in thinking that there is anything unlawful, immoral or opposed to public policy in the levying of the charge called 'kuntagari.' It is a charge which riparian proprietors impose on boatmen who drive stanchions or pegs into their land on the bank of a navigable river for the purpose of attaching their boats thereto and so mooring them. These stanchions or pegs which are driven above the water-mark undoubtedly endanger the stability of the bank, and a riparian proprietor is clearly entitled to demand payment for such use, accompanied as it is with possible detriment of his property. A charge of the kind for the use of his land is a right incidental to the possession thereof by its possessor. It is not a charge of a compulsory character, for no boatment need make use of the land in this manner save at his own option. Nor can we find any authority for the proposition that there is a common right in the public who travel by boat in navigable rivers to drive stanchions at will, and without reference to the riparian proprietors, into the banks of such rivers above the water-mark for the purpose of mooring their boats."

*Dhunput
Singh v.
Denobundhu.*

Right to any
tolls and
Khuntagari
charges.

(1) (1881) 9 Cal. L. R. 279.

From the above portion of the judgment it seems that the learned Judges were thinking of the *foreshore* as well, when they said that the stability of the bank would be endangered by driving stanchion's or pegs above the *water-mark* i. e. above the line where water usually stands, namely, the *low-water* mark. The expression "water-mark" in the above passage has been used as opposed to the bed under water in respect of which the riparian owner may not have any claim. A claim for charge of this kind by the riparian owners for the use of the space between the high and low water mark adjoining the bank, which is called *foreshore*, would not be illegal as it is a right incidental to the ownership of the bank. The learned Judges (Morris & Tottenham, JJ.) apparently upheld this view in that case.

*Common
practice.*

In fact, it is a matter of common experience to notice that, in this country, *zemindars* in *Mofussil* on the banks of tidal navigable rivers do very often realize charges of the similar description from boatmen for mooring their boats on the foreshore at ebb-tides and on the bank at full tides. In some cases such right of levying tolls is let out in *ijara* to persons called *Ghatmanjhi* or *ijaradar* of the *Ghats* in the vicinity of principal markets, hats, stations for steam vessels, or boats carrying passengers and goods. No question of the *foreshore* being owned by the Government has ever been raised. It has been always considered that such right can be exercised by the riparian proprietors as owners of such banks. It is a right which the riparian owners has been accustomed to exercise for a long time and it can thus be regarded as a customary right.

Tolls and
other charges
under the
English law.

Tolls or charges like the above were not disallowed under the English Law. There are instances in which a riparian or littoral proprietor has been held to be entitled to levy such charges. But, to support the right to claim such charges it must be established that the

soil in respect of which the claim is made was within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil (1). In fact, in such cases the issue turns upon an investigation into the question whether there is a good consideration for a reasonable toll. In *Lord Falmouth v. George* (2), it was held that keeping up a capstan and rope in a cove to assist boats in landing and without which they could not safely land in bad weather, was a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstan or not. See also *Foreman v. Five Fishers of Whitstable* (3).

The riparian owners on the banks of navigable rivers in this country have the right of free access to their banks from the rivers. Such rights in this country may be treated as analogous to the right of wharf-owners on the banks of a navigable river under English and American laws. In *Rose v. Groves* (4), where the plaintiff, a riparian owner, had a public-house on the Thames and complained that the access to and from the river was obstructed by the defendant wrongfully and maliciously placing and keeping timber in the river, so as to drift opposite the plaintiff's house; the Court held that this was an injury to the plaintiff's right of property distinct from the public right of navigation. The law, in America, on this point seems to be that rafts-men on navigable streams have no right to moor their rafts in such a manner as to deprive wharf-owners of access to their wharves: *Harrington v. Edwards*, 17 Wis. 586. In that case, the defendant owning a vessel and a wharf upon a navigable stream, and finding a raft of lumber belonging to the plaintiff fastened in the stream so as to obstruct the approach of his vessel to

Right to free
access to the
banks.

(1) Law of Waters by Coulson and Forbes, p. 493 (7th Edition.)

(2) 5 Bing. 286 : 30 R. R. 597.

(3) L. R. 3 C. P. 586 : L. R. 4 H. L. 266.

(4) 5 M. & C. 613 : See Coulson and Forbes p. 111.

Right to erect
structures
on the banks.

Jugal Das
v.
Queen-
Empress.

Gopal Reddi
v.
Chenna Reddi.

his wharf, untied the raft, doing no unnecessary damage; and not being in charge of any person it floated away. It was held that he was not liable for the loss of the lumber (1). As regards the right of a riparian proprietor on the bank of a navigable river to moor his vessel to his bank for loading and unloading, reference may be made to the case of *Original Hartlepool Colliery v. Gibb* (2). Every riparian proprietor on the banks of a navigable river has a right to erect such works as are necessary for the protection of his lands, against the incursion of flood water provided that he does not thereby cause any injury to others (3). In this country, such right of erection to protect property from encroachment of a navigable river has been recognised by the Calcutta High Court, as would appear from the following observations made in the case of *Jugal Das Dalal v. Queen-Empress* (4):—"We may observe that there are circumstances well-known to us in connection with large navigable Indian rivers which would render it desirable, if not absolutely necessary, to permit some encroachment from the banks for the protection of the property of private parties, such as the erections of spurs to prevent diluvion." In the case of *Gopal Reddi v. Chenna Reddi* (5), the claim was for recovery of damages and an injunction to compel the defendant to remove the bund erected by him on the bank of a stream to prevent his land from being submerged. In that the defendants who were owners of the land on the banks of a jungle stream, raised embankments which prevented their lands from being flooded, but caused the stream to overflow the land of the plaintiff situated lower down the stream. It was found that it was not reasonably practicable for the defendants to

(1) Angell on Watercourses, p. 716 (foot-notes.) (2) 5 Ch. D. 713.

(3) *R. v. Trafford*, 8 Bing 204 : 34 R. R. 680. *Ridge v. Midland Rail Co.*, 53 J. P. 55.

(4) I. L. R. 20 Cal. 665 (669).

(5) I. L. R. 18 Mad. 158.

defend their lands from inundation by any means other than those adopted which would not have caused damage to the plaintiff. Under these circumstances, it was held by the Madras High Court (*per* Parker & Shephard, JJ.) that no actionable wrong had been committed by the defendant and that the suit was not maintainable. Shephard, J., in delivering his judgment in that case, after referring to a number of English decisions, said :—"It is quite another matter to hold that the landowners are not at liberty to improve their land by keeping a stream within bounds. Where an act of mere prevention is complained of, I think it must be shown that the defendant has in fact diverted the stream from its natural course. Here, as I understand the facts, the stream, when in flood, took no definite course but simply spread itself over the defendant's lands and so did not come in its full volume to the plaintiff's lands. What the defendants have endeavoured to do is to confine the flood water to the ordinary channel, and it is open to the plaintiff to adopt the same measures of defence. Instead of so doing the plaintiff in effect demands that the defendant's land shall for ever continue to remain subject to periodical inundation and therefore less fit for cultivation than it might otherwise be." The view thus expressed by Shephard, J. was discussed by Sir Subrahmanya Ayyar in the case of *Venkata Chalam v. Zemindar of Sivaganga* (1).

It may be noticed in this connection that there is no common law liability upon the riparian owner to repair the embankment upon his riparian bank as has been pointed out by the Calcutta High Court in the case of *Nuffer Chunder Bhutto v. Jotindra Mohun Tagore* (2).

Another kind of riparian right has been recognized in this country by the express provisions of the law declared by Act IV of 1868 (The Alluvion Act of

No liability
to repair
embankment.

(1) I. L. R. 27 Mad. 409 (412).

(2) I. L. R. 7 Cal. 505.

Right to apply to the Collector for construction of ways, paths, roads upon islands which subsequently become annexed to main land.

1868, B.C.). By section 5 of that Act, power has been given to any person having an estate or interest in any part of the riparian mainland to which an island taken possession of by the Government acting under Sec. 4, Cl. III of Regulation XI of 1825, has become attached, to apply to the Collector to take measures for the construction of ways, paths, and roads on such island, for securing access to the river or sea from the land to which the island has become attached. Every way, road, and path which shall be laid out or appointed under the provisions of that Act shall be deemed a public high way.

Right of navigators to use the banks under English law.

Liability of the Riparian Owners on the Banks of Navigable rivers:—Next, in order to determine the liabilities of a riparian owner in relation to the banks of a navigable river, it is necessary to consider the rights which can be lawfully exercised by the public upon the banks while navigating such rivers. It has been said that according to the law of England, the public right of navigation includes such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels—such as the right of stopping for a reasonable time to unload, and of grounding and anchoring free of toll, and of fixing moorings (1). But it has been held that the public have no right of landing on the banks, or of drawing up or leaving fishing boats above high water mark apart from exceptional circumstances such as stress of weather (2). Fishermen as such, have no right to dry their nets on the bank either of a tidal or a non-tidal river, or to use it for a purpose accessory to fishing, but they may acquire such rights by prescription (3). The banks of a tidal river above high water mark

(1) See p. 31 *ante*.

(2) *Hechester v. Rashleigh*, 5 T. L. R. 739 : 38 W. R. 104 ; *Law of Waters* by Coulson and Forbes, p. 115.

(3) *Gray v. Bond*, 2 B. & B. 667 : 23 R. R. 530.

remain private property of the adjoining land owner, and are not *publici juris*, so as to give the public navigating the river a right, in the absence of prescription, to land themselves or their goods or to moor their vessels thereon (1). The public are not entitled at Common Law to tow on the banks, as laid down in the case of *Ball v. Herbert* (2). In that case, the question was brought directly before the King's Bench, whether at Common Law, the public have the right of towing on navigable rivers. Lord Kenyon, C. J. in delivering the judgment, said :—"Now common law rights are either to be found in the opinion of lawyers, delivered as axioms, or to be collected from the universal and immemorial usages throughout the country. That the right now in question is not to be collected from the unanimous current of authorities is manifest. Very little is to be found in the books upon the subject, the whole of which down to his time Lord Hale has collected; and after commenting upon it, he seems to have formed an opinion against the right: for he says that, where private interests are involved in the question they shall not be infringed without a satisfaction being made to the parties injured. But on what ground can a common law right stand, if satisfaction is to be made for the enjoyment of it and that satisfaction be not ascertained. It must resolve itself into an agreement between the parties, and can not be considered as a right to use the banks indefinitely. And some of the passages in Lord Hale, which seem to favour the common law right, are rather applicable to the banks of the sea and to ports; and it is part of the King's prerogatives to create ports, which was lately exercised at Liverpool"

Right of
towing on the
banks under
English law.

If would follow from the above decision that the right of passage over the banks of a navigable river for the purpose of towing vessels is an easement or right of way

only, similar in all respects to the ordinary rights of way. The right of towing is thus regarded in England as a right which depends upon usage and custom.

Right of a
towing path
under the
Roman law.

According to the Roman Civil Law which prevails in greater part of Europe the privilege of towing on the banks of navigable rivers is embraced in the public right of navigation. The Roman Law on the point as declared by Justinian may be stated thus—"By the Law of Nations, the use of the banks of a river is public just as is that of the river itself. Thus every one has a right to bring his vessel to the bank, to tie ropes to the trees that grow there, or to place any portion of his cargo on it, just as much as he has the right to navigate the river itself. But still, the property of the banks is vested in those who are proprietors of the lands which adjoin: for which reason, the trees which grow upon them belong to the proprietor (1)." Thus according to the Roman Law the bank is private property, but still, the public have a right to use it in such a way as would be necessary for the convenient exercise of the right of navigation, namely, for the purpose of mooring their vessels, and loading and unloading their cargo.

It would, therefore, be apparent that the doctrine of the Common Law of England on this subject is at variance with that of the Roman Civil Law. But the common law theory of the ownership of the *forshore* by the Crown as a trustee on behalf of the public serves the purpose for which the Roman Law gave the use of the banks to the public. According to the law of England a portion of the banks, namely, the space between the high and low water mark is reserved for public use under the ownership of the Crown, and enactments have been passed restraining the Crown

(1) Institutes of Justinian, Book II. Title I, Sec. IV, by William Grahnel, p. 51.

from parting with such ownership to the detriment of the public right of navigation.

In America, the law upon this point seems to be different in different states. The Supreme Court of Illinois, and that of Tennessee, have decided, agreeably to the Civil Law, that the right of navigators was not limited to the bare privilege of floating upon the river Mississippi, but included the right to land, and fasten to the shore, as the exigencies of the navigation may require ; and that such was a burden upon the owner of the land, which he must bear as a part of the public easement (1).

Right of navigators to use the bank under American law.

In Mississippi, the banks of a river which is a public high way, are private property, subject to the exclusive appropriation of the owner and are not subject to the use of the public, although the river itself may be a high way. The banks of navigable rivers, in Missouri, are public high ways, and, though owned by private individuals, fishermen, and navigators are entitled to a temporary use of them in landing, fastening, and repairing their vessels and exposing their sales or merchandise ; yet this right has its reasonable qualifications and restrictions, and will not allow a navigator to land for an unreasonable length of time, and, under pretence of repairing, employ teams &c., and thereby unreasonably obstructing the owner's enjoyment of his property (2).

Now, turning to the Regulation it will be seen that it recognizes the right of *towage* on the banks of navigable rivers. In this respect the law declared by the Regulation is in conflict with the law of England. According to the English law, as noticed before, the public navigating a river have no right to demand a towing path along the *bank*, but such right can be exercised on the *foreshore* by the public. An inter-

Right of towage on the banks under the Regulation.

(1) Angell on Watercourses § 552..

(2) Ibid. § 553.

ruption of such right on the *foreshore* is punishable like the obstruction to the towing path on the banks of a navigable river under the Regulation. According to the physical condition of the rivers in the United Kingdom, merely the reservation of the *foreshore* for the public use may have been considered sufficient by the nation to serve the purpose of affording all possible facilities to navigators and for the free exercise of other rights incidental to the right of public navigation, and the private ownership of the bank, for that reason, was not considered necessary to be violated. It is no doubt open to the public to acquire the right of towage upon the private bank by long user or prescription on the tidal or non-tidal navigable rivers. Moreover, with the invention of the steam engine, the necessity of a claim for towing path on the bank has been gradually diminishing in England. Comparing the condition of things in England with those of this country, where the greater portion of the navigation is carried on by country-boats, it would seem that the necessity of towing path on the banks of a navigable river is imperative. It would, therefore, seem probable that the framers of the Regulation who were trained in English law realized, while enacting that provision, that the absence of any such clause in the Regulation may give ample opportunities to the riparian zemindars to offer obstruction to, and levy tolls upon, boatmen who may happen to pass along the bank for towing their boats. The Regulation lays down that it will be competent for any Magistrate or public officers specially empowered on this behalf to remove any obstruction that may be placed upon such banks by the riparian proprietor. Obstructions so placed will be removed by the public officer acting under the provisions of Chapter X of Act V of 1898 (Code of Criminal Procedure), apparently by the application of the theory that such

a towing path on the banks of a navigable river is a public highway. In this view the riparian owners incur criminal liability by obstructing the public way, which will be a nuisance under section 283 of the Indian Penal Code (Act XLV of 1860)

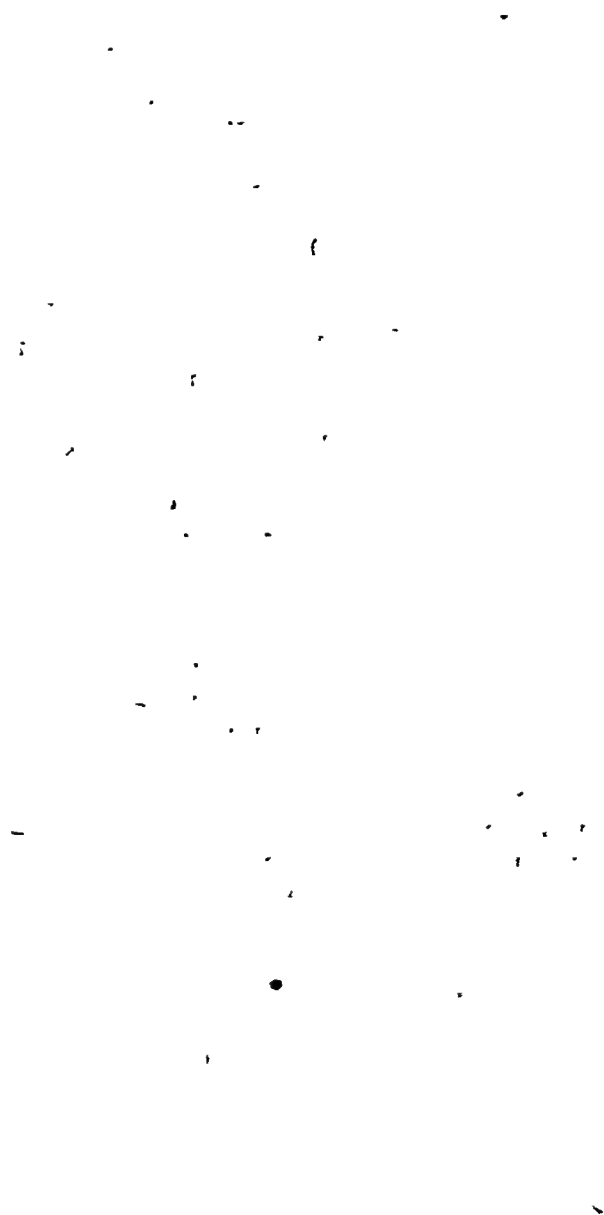
It would, next, appear, that if such towing path on the banks be regarded as a public high way, it will recede or advance with the recession and advance of the banks (1). If the banks of navigable rivers advance on account of the accession of land by alluvion such path will be transferred to the accreted portion, as would seem to follow from the following observations made by the Calcutta High Court in the case of *Maharani Odhirani Narain Kumari v. The Nawab Nasim of Bengal* (2):—"Till the land rises beyond ordinary high water mark in such a way as to become fit for cultivation, it is part of the river-bed, and, as such public property. And when it does so rise as to become private property, the public will still be entitled to some access to the river which was enjoyed before the new land was formed on the bank." As a corollary to this view, it may be affirmed that the accession to the riparian bank will be subject to the same right of way over it as was enjoyed on the old bank. Reference may, in this connection, be made to sections 5 to 8 of Act IV of 1868 (the Alluvion Act, B. C.) which have been discussed before (see p. 724 *ante*.)

Shifting of the towing path by recession and encroachment of the river.

The banks of a navigable river may be said to recede when they are encroached upon, or diluviated by the river. In such case, the new river-banks thus formed may be taken to be included within the denotation of the term "bank" used in section 5.

(1) See p. 715 *ante*.

(2) 4 Suth. W. R. 41.



APPENDIX.

THE INDIAN ALLUVION BILL, 1878.

A Bill to define and amend the law relating to alluvion islands and abandoned river-beds.

Whereas it is expedient to define and amend the law relating to alluvion, islands and abandoned river-beds ; It is hereby enacted as follows :—

I.—PRELIMINARY.

Short title. 1. This Act may be called "The Indian Alluvion Act, 1879 ;

Local extent. It extends to the whole of British India ;

Commencement. And it shall come into force at once.

2. The Acts, Regulation and Rules mentioned in the schedule

Repeal of enactment. hereto annexed shall be repealed to the extent specified in the third column. References to the Regulation and Rules so repealed, in enactments passed subsequently thereto, shall be read as if made to this Act—

Interpretation Clause 3. In this Act—

"island" includes land arising in a river or lake, submerged in the wet season and visible only in the dry season, but it excludes land arising in tidal rivers, tidal lakes or the sea, submerged by the flow of ordinary tides ;

"thread of the stream" means (a) the middle line of the main stream during the dry season, or (b) the middle line between what are the shores on each side when the water is at its average height, neither swollen by flood, nor shrunk by drought, or (c) the middle line of the particular channel in which the island referred to arises ;

"owner" means, in the case of a bank or shore held on raiyat-wari tenure, the Crown in the case of a bank or shore forming part of land situate in the Presidency of Bombay and wholly or partially exempt from the payment of land-revenue, or held under a grant or lease fixing the Government demand in respect thereof in perpetuity the holder of such land ; and in the case of a bank or shore held by a village community in the Punjab, such community

"sea" includes bay, inlet, creek and arm of the sea ;

and a channel is said to be "fordable" when it does not exceed five feet in depth in the dry season and throughout the twenty-four hours

II.—ALLUVION

4. Where, from natural causes, land forms gradually on the bank of a river or on the shore of the sea, of a lake, or of an island, either by accumulation of material or by recession of the river, sea or lake, the owner of the bank or shore shall be entitled to the land so formed :

Provided that, where the land forms on a site of which a private person is proved to be the owner, such person is entitled to the land so formed.

III.—ISLANDS.

5. Where an island is formed, from natural causes, in a river, the sea or a lake, either by accumulation of material or by recession of the river, sea or lake, if when the island is first formed, the channel between the bank or shore and such island is not fordable at any point, the Crown is entitled to such island.

Provided that, where the island is formed on a site of which a private person is proved to be the owner, such person is entitled to the island.

6. If, when an island is first formed as aforesaid in a river, the sea or a lake, the channel between the bank or shore and such island is fordable at any point, the following rules shall take effect (namely)

(a)—where the island is formed in the sea or a lake, the owners of the nearest shore are severally entitled to the island in proportion to the frontage which they respectively have on the sea or lake opposite the island.

(b)—where the island is formed in a river and is wholly on one side of what was the thread of the stream immediately before the formation, the owners of the bank on that side are severally entitled to the island in proportion to the frontage which they respectively have on the river opposite the island.

(c)—where the island is formed in a river and is partly on one side and partly on the other of what was the thread of the stream immediately before the formation, the island is supposed to be divided by such thread, and the owners of the banks are severally entitled to the division opposite their banks in proportion to the frontage which they respectively have on the river opposite the island.

(d)—Provided that, where the island is formed on a site of which a private person is proved to be the owner, such person is entitled to the island.

Explanation—“Frontage” means the right line connecting the corners of each holding where they strike the sea, lake or river, and the frontage is “opposite” the island when a perpendicular erected at any point thereof, in the plain of the sea, lake or river, intersects the island.

7. If a river in forming a new arm divides and surrounds land belonging to the owner of the bank, and thereby forms an island, such owner is entitled to the island.
- Island formed by division of river.

IV.—ABANDONED RIVER-BEDS.

8. If a river, whether navigable or not, suddenly forms a new bed, abandoning its ancient bed, the ancient bed is supposed to be divided by what was the thread of the stream immediately before the abandonment, and the owners of the ancient banks are severally entitled to the division opposite their banks in proportion to the frontage which they respectively have on the ancient bed.

Provided that when the ancient bed is proved to have been, immediately before the abandonment, the property of the Crown or of a private person, it shall continue to be the property of the Crown or of such person, as the case may be.

V.—MISCELLANEOUS.

- Power to declare “main-stream,” “dry season” and “thread of the stream.”
9. The Local Government may, from time to time, declare, with reference to any river, or any part of any river,—

(a)—what shall be deemed to be, for the purposes of this Act, the “main-stream” and the “dry season” and

(b)—which of the said definitions of “thread of the stream” shall be deemed to be in force

Every such declaration shall be published in the official Gazette, and shall thereupon have the force of law.

In the absence of a declaration under clause (b) as to any river or part thereof, the first of the said definitions of “thread of the stream” shall be deemed to be in force with reference to such river or part

10. Nothing herein contained shall—

(a)—affect any law relating to the assessment of land-revenue or to the enhancement or abatement of rent ; or

(b)—confer on any owner of a bank or shore in respect of which he is hereby declared to be entitled to alluvial land, to an island or to an abandoned river-bed any title to such land, island or river-bed better than that which he has to the bank or shore ; or

- (c)—enlarge any holding granted by Government, the area of which has been fixed by any sanad or other document executed under the authority of Government ; or
- (d)—authorize any acts of private persons done in order to divert currents or cause accretions ; or
- (e)—authorize any encroachments by private persons on the beds or channels of navigable rivers ; or
- (f)—prevent any officer of Government duly empowered in this behalf from removing obstacles which appear to him to interfere with the safe and customary navigation of such rivers, or which obstruct the passage of boats by tracking on the banks of such rivers or otherwise ; or
- (g)—prevent any officer of Government duly empowered in this behalf from regulating the direction and flow of such rivers and the preservation and distribution of their waters.

And nothing herein contained shall affect any clear, definite and immemorial local usage respecting the right to alluvial land, islands or abandoned river-beds ; but (except in the cases provided for by the Punjab Land-Revenue Act, 1871, section 16) the burden of proving such usage shall lie on the person alleging it.

11. All land and islands formed, and all river-beds abandoned, as mentioned respectively in sections four, five and eight, and not vesting under any of the provisions here-in-before contained, shall vest in the Crown.

Right of Crown to alluvial lands, &c, not here-in-before provided for.

The Schedule.

(a). ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
IV of 1872	Punjab Laws Act	So much as relates to Bengal Regulation XI of 1825.
XX of 1875	Central Provinces Laws Act.	Ditto.
XVIII of 1876	Oudh Laws Act.	Ditto.

(b)—BENGAL REGULATION.

Number and year.	Subject.	Extent of repeal.
XI of 1825.	Alluvion.	The whole.

(c) BENGAL ACT.

Number and year.	Subject.	Extent of repeal.
IV of 1868.	Amending Act IX of 1847	Sections 2 and 4.

(d) RULES.

Date.	Subject.	Extent of repeal.
22nd May 1852.	Alluvion and Diluvion in Sindh.	Paragraphs 1, 2, 3, 4, 5 and 20.

THE INDIAN ALLUVION BILL, 1881.

A Bill to define and amend the law relating to alluvion, islands and abandoned river-beds

Whereas it is expedient to define and amend the law relating to alluvion, islands and abandoned river-beds ; It is hereby enacted as follows :—

I.—PRELIMINARY.

Short title. 1. This Act may be called "The Indian Alluvion Act, 1882"

Local extent. It extends to the whole of British India ;

Commencement. And it shall come into force on the first day of March, 1882.

2. The Acts, Regulation and Rules mentioned in the first Schedule hereto annexed; shall be repealed to the extent specified in the third column. Repeal of enactments. Reference to the Regulation and Rules so repealed, in enactments passed subsequently thereto, shall be read as if made to this Act.

Interpretation-clause. 3 In this Act—

"island" means land surrounded by water and capable of being employed for cultivation, pasture or other useful purpose. It includes such land arising in a river or lake, submerged in the wet season and visible only in the dry season, but it excludes land arising in tidal rivers, tidal lakes or the sea, submerged by the flow of ordinary tides throughout the year :

"frontage" used with reference to a holding means the line or lines determined for such holding in the manner prescribed in the second schedule hereto annexed :

and a channel is said to be "fordable" when it does not exceed five feet in depth on the dry season next after the formation referred to and throughout the twenty-four hours.

II.—ALLUVIAL LAND AND ABANDONED RIVER-BEDS.

4. Where from natural causes land is formed by imperceptible degrees, on the bank or shore of a river, the sea or a lake, either by accumulation of material or by recession of the river, sea or lake, the owner of the bank or shore is entitled to the land so formed.

Right to alluvial land formed on bank or shore.

When the formation takes place at the junction of two holdings, each owner shall be entitled to so much of the formation as lies on his side of a line drawn through the point of junction and bisecting the angle between the two frontages at that point.

5. Where an island is formed, from natural causes, in a river, the sea, or a lake, either by accumulation of material or by recession of the river, sea, or lake, if the island is separated from each bank or shore by a channel not fordable at any point, the Government is entitled to such island.

6. Where an island is formed from natural causes in a river, the sea, or a lake, either by accumulation of material or by recession of the river, sea or lake, and is separated from the bank or banks by a fordable channel or fordable channels.

and where from natural causes any land is formed, otherwise than by imperceptible degrees on the bank of a river, the sea, or a lake, either by accumulation of material or by recession of the river, sea or lake,

and when a river suddenly abandons its bed, each particle of the island or land so formed, or the river-bed so abandoned, shall belong to that one of the riparian owners who can show a point on the frontage of his holding nearest to such particle :

Provided that when the channel separating an island so formed from a river from one bank is fordable and the channel separating such island from the other bank is not fordable, the owners of the former bank shall alone be entitled as such to the island

Provided also that when the line dividing the formation to which one owner is entitled under this section from the formation to which another owner is entitled under this section is an arc of a curve, the chord of such arc shall be substituted therefor

III MISCELLANEOUS

7. The Local Government may from time to time, declare with reference to any tidal river, where, for the purposes of this Act, the river shall be deemed to end and the sea to begin.

Every declaration made under this section shall be published in the Official Gazette and shall thereupon have the force of law. And no such declaration shall be cancelled or altered save with the previous sanction of the Governor-General in Council

Savings.

8. Nothing herein contained shall—

(a) affect any law relating to the assessment of land-revenue or the enhancement or abatement of rent ; or

(b) confer on any owner of a bank or shore in respect of which

he is hereby declared to be entitled to alluvial land, to an island, or to an abandoned river-bed, any title to such land, island or river-bed, better than that which he has in the bank or shore, or

- (c) enlarge any holding granted by Government, the area of which has been fixed by any sanad or other document executed under the authority of Government ; or
- (d) authorise any acts of private persons done in order to direct currents or cause accretions ; or
- (e) authorise any encroachments by private persons on the banks, beds, or channels of navigable rivers ; or
- (f) prevent any officer duly empowered by the Local Government in this behalf from removing obstacles which appear to him to interfere with the safe and customary navigation of such rivers, or which obstruct the passage of boats by tracking on the banks of such rivers or otherwise ; or
- (g) prevent any officer duly empowered by the Local Government in this behalf from regulating the direction and flow of such rivers and the preservation and distributions of their waters ; or
- (h) effect the right of the Government or a private owner—to land formed on a site which is proved to belong to the Government or such owner ; or

to the ancient bed of a river which is proved to have belonged to the Government or such owner, immediately before its abandonment.

9. Nothing herein contained shall affect any definite and well established local usage respecting the right to alluvial land, islands or Local usage saved. abandoned river-beds ; but (except in the cases provided for by the Punjab Land-Revenue Act, 1871 section 16) the burden of proving such usage shall lie on the person alleging it.

10. All land and islands formed and all river beds abandoned as mentioned respectively in sections four and five, and not vesting under any of the provisions hereinbefore contained, shall vest in the Government.

[e. g. islands not formed from natural cause].

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